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LEADING ARTICLES

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THE COURT SYSTEM OF MISSISSIPPI . . . . . *A. B. Butts* 97

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MISSISSIPPI LAW JOURNAL

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THE LAW OF ARREST

By Geo. H. Ethridge*

The law of arrest is a subject which should attract the attention of every person, whether layman or lawyer. In a free government where the powers of the officers are limited by the law and are derived wholly from the law, and where every officer is subject to the law, it is necessary for both citizens and officers to have a better knowledge of the law of the land than is required of citizens of other countries. In theory, the law is enacted by the people, for the people, and exists for the good of the whole people rather than for one class. A citizen is under duty to obey the law and submit to lawful arrest, but he has the right to resist unlawful arrest and to challenge the authority of any officer or person seeking to restrain his liberty. When he submits to arrest he is necessarily deprived of his means of defense, and is wholly subject to the disposition and commands of the person or officer arresting him. He may be disarmed and shackled, and his means of self defense, under such circumstances, is rendered ineffective and useless, and his power in that regard destroyed. Many persons have met death at the hands of persons claiming they had a right to arrest, by being rendered helpless and being mobbed after arrest. When the character of the officer is known it is, of course, practically safe to submit to arrest, but in this country, many peace officers have no official regalia or badge of authority by which persons may distinguish them.

It is especially important that officers charged with the duty of making arrests should know the law pertaining thereto. If they make wrongful arrests they are liable in

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damages for so doing, and if they fail to make arrests when under duty to do so, they are subject to indictment and removal from office and to impeachment by the Legislature.

"The first duty an officer having power to arrest should learn, is what his duties are and what his powers are under the law to make arrests. And, while the law and the courts will uphold him to the fullest degree in his acts in the pursuance of law, it will not and cannot rightfully shield him when he himself violates the law. One seeking to enforce the law must certainly be held to do so in accordance with the law. The people's right to security from unlawful arrest is entitled to just as much respect in court as the right of an officer to enforce the law for the protection of the people. While the authorities differ as to the right of a person to resist arrest to the extent of taking life, it seems to me that in the very nature of things a person must be given the right to resist force with force to any necessary extent to preserve his liberty."

The officer, as a rule, is not skilled in knowledge of the law when he is elected to his office, and does not often know just where to find the law bearing on it. He frequently does, and should, take counsel with some one versed in the law pertaining to his duties to get the necessary information, and, very naturally, he consults a lawyer upon whose judgment he relies. It is peculiarly appropriate, therefore, that all lawyers should thoroughly familiarize themselves with the law of arrest, so that they may give sound and wise advice to officers seeking knowledge upon that subject.

In the hope that I may attract attention and cause thoughtful study of this subject among the members of this Bar, and especially the younger members of the Bar, I shall discuss some phases of this subject, and refer to authorities which will, I trust, give some interest to readers of this article and result in some investigation of the subject. Lawyers may be very useful members of society, and upon few subjects could their learning be better employed than by being wise counsellors of the people, using such occasions as may come to them to render such service.

As most of the litigation bearing upon arrestor connected with arrest, and the rights and remedies therefor, are in the circuit court, the judge of that court, among other things, must charge the Grand Jury each term of the Circuit Court, and instruct them as to the duties of public officers. Lawful arrest being among the most prominent of the duties of officers under constitutional provisions hereinafter to be referred to, that subject should be expounded, and if it was at each term of the Circuit Court, both the officers and the people would soon become familiar with

the subject. In 5th C. J., 385, et seq., the subject of arrest is dealt with, and is defined as follows:

"An arrest consists in taking, under real or assumed authority, custody of another person for the purpose of holding or detaining to answer a criminal charge or civil demand. What constitutes an arrest is a question of law. The custody or control, the assumption of which is involved in an arrest, imports actual restraint or detention, the mere utterance of words indicative of an arrest being insufficient, except, perhaps, when followed by submission, as is also the reading or verbal proffer of the warrant, without more, or mere personal service of process. An arrest is not consummated until there has been a taking of possession of the person by manual caption or otherwise, but the requisite control may be assumed without force, and in any manner by which the subject of the arrest is brought within the power or control of the person making it. Nor is manual touching necessary where the subject of the arrest submits thereto, or is otherwise actually subjected to restraint. But, where the person resists arrest, some manual touching of the body has been held necessary to consummate the arrest."

In the same book, page 387, under the heading of "Criminal Arrest," it is said that:

"A criminal arrest is one made in order that the person arrested may be forthcoming to answer a criminal charge, or to prevent the commission of a criminal offense. With certain exceptions, all persons capable of committing crime are equally liable to arrest in all criminal cases, although no man should be arrested unless he is charged with such a crime as will at least justify holding him to bail when taken. A mere intent to commit a crime does not justify an arrest, nor should an arrest be made merely on suspicion."

As this article will deal primarily with the law of arrest in the State of Mississippi, and as there are differences in the laws of different states upon the subject, I shall refer to certain constitutional and statutory provisions bearing upon the subject, and the decisions of our state court referring to the same, and general treatises, cases, and case notes, where the subject is discussed.

Section 23 of the Constitution of 1890, the supreme law in the State of Mississippi, provides that:

"The people shall be secure in their persons, houses and possessions, from unreasonable seizure or search; and no warrant shall be issued without probable cause, supported by oath or affirmation, specially designating the place to be searched and the person or thing to be seized,"

and so is designed to protect the people in the enjoyment of their liberty from unreasonable arrest and the seizure of person or property. Seizure can only be made as permitted

by this section of the Constitution. The Legislature, itself, cannot engraft unreasonable exceptions upon the Constitution. The Constitution is designed for the protection of the people, not only from the Executive Department of Government, but also from the Legislative and Judicial Departments of Government. In other words, this constitutional provision is the law for the government of the officers as well as for the people, as it is designed to secure liberty and the free exercise of functions of body and mind. Therefore, it must receive a liberal construction favorable to the citizen against the government. *Falkner vs. State,* 134 Miss. 253, 98 So. 691; *Boyd vs. U. S.,* 116 U. S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746; *Gouled vs. U. S.,* 265 U. S. 298, 41 Sup. Ct. 261, 65 L. Ed. 647; *Thompson vs. Grand Gulf R. R. & Banking Co.,* 3 How. (Miss.) 240, 34 Am. Dec. 81.

"A constitution should be construed so as to effectuate, not defeat, the policy indicated by its framers." *Brian vs. Williamson,* 7 How. (Miss.) 14.

The Constitution must be construed in the light of the common law, and its meaning determined from a history of the common law, and the liberties which were claimed by the people and exercised thereunder. This has been discussed in the case of *Ex parte Grossman,* 267 U. S. 87, 45 Sup. Ct. 332, 69 L. Ed. 527. In that case the rule was stated by Chief Justice Taft as follows:

"The language of the Constitution cannot be interpreted safely except by reference to the common law and to British institutions as they were when the instrument was framed and adopted. The statesmen and lawyers of the Convention, who submitted it to the ratification of the Convention of the thirteen states, were born and brought up in the atmosphere of the common law and thought and spoke its vocabulary. They were familiar with other forms of government, recent and ancient, and indicated in their discussions earnest study and consideration of many of them, but when they came to put their conclusions into the form of fundamental law in a compact draft, they expressed them in terms of the common law, confident that they could be shortly and easily understood."

At the common law, an arrest could be made without a warrant only in specific cases, as where a felony had been committed and there was "probable cause" to believe that the person sought to be arrested had committed such felony, and in misdemeanors only where the offense constituted a breach of the peace and was committed in the presence of the officer, or where there was a breach of the peace threatened in the presence of the officer, or a crime threatened which would amount to a felony if committed, in which

cases the officer would make arrests without warrants. No arrest could be made for misdemeanors not committed, or threatened, in the presence of the officer without a warrant supported by affidavit. A warrant could not be issued according to the common law without an affidavit being made. In 5th C. J., p. 416, Sec. 45, under the title, "What constitutes presence or view," it is said that, "An offense is committed in the presence or view of an officer within the meaning of the rule authorizing an arrest without a warrant, when the officer sees the acts constituting it, although at a distance, view of such acts as constitute reasonable grounds for arrest being sufficient. An offense is likewise deemed committed in the presence of the officer when he hears the disturbance created thereby and proceeds at once to the scene, or where the offense is continuing, or has not been fully consummated, at the time the arrest is made. He must, however, have direct, personal knowledge, through sense of sight or hearing, that the offense is the act of the accused. Merely being near enough to see, but not seeing, is not sufficient, unless the failure to see is due to darkness, and the lack of seeing is made up for by hearing." On the same page, as to what constitutes reasonable and probable grounds of suspicion, it is said: "While an officer may arrest without warrant under certain circumstances, as already seen, he may not act arbitrarily, but must exercise discretion in a legal manner, using all reasonable means to avoid mistakes. The reasonable and probable grounds that will justify an officer in arresting without a warrant one whom he suspects of felony must be such as would actuate a reasonable man acting in good faith. The rule is substantially the same as that in regard to probable cause in actions for malicious prosecution, and there is no difference in its application, between arrests for felonies and arrests for misdemeanors. The necessary elements of the grounds of suspicion are that the officer acts upon a belief in the person's guilt, based either upon facts or circumstances within the officer's own knowledge, or upon information imparted to him by reliable and credible third persons, provided there are no circumstances known to the officer sufficient to materially impeach the information received. It is not every idle and unreasonable charge which will justify an arrest. An arrest without a warrant is illegal when it is made upon mere suspicion or belief." See *Berry vs. Priddy,* 126 Miss. 125, 88 So. 577; *Hamilton vs. State,* 115 So. 427; *Loeb vs. State,* 133 Miss. 883, 98 So. 449. In this latter case,

the question of "probable cause" was discussed, and, quoting from Black's Dictionary, at page 986 of the Mississippi Report, was defined as follows:

" 'Probable Cause' may be defined to be an apparent state of facts found to exist upon reasonable inquiry, (that is such inquiry as the given case renders convenient and proper) which would induce a reasonably intelligent and prudent man to believe, in a criminal case, that the accused person had committed the crime charged, or in a civil case, that a cause of action existed," and also other definitions.

It will be seen that probable cause may exist, although the officer has not personal knowledge of the facts constituting it, if his information in regard thereto has been derived from a credible person and is such that a reasonable and prudent man would believe. However, the facts constituting probable cause are for judicial decision, and the judgment of the officer is not conclusive. It will be seen, therefore, that Section 23 of the Constitution imposes important limitations upon peace officers in making arrests, and in issuing warrants therefor. This section, as stated, is for the protection of the people and their liberties. The Legislature cannot annul its provisions by statutes contrary thereto. The Legislature may and should enact laws clarifying the provisions and defining them, and it has done this, so that the officer, by consulting the Code upon the subject, will find declared by statute the conditions and circumstances which authorize him to act. I will briefly review these statutes. By Section 1262, Hemingway's 1927 Code, Sec. 1444, Code of 1906, it is provided that arrests for crimes and offenses may be made by the sheriff or his deputy, or by any constable or conservator of the peace within his county, or by any marshal or policeman of a city, or village, within the same, and that private persons may also make arrests.

By Section 1263, Hemingway's 1927 Code, Section 1445, Code of 1906, it is provided that, "Every person when commanded so to do by an officer seeking to arrest an offender, must aid and assist in making the arrest, and must obey the commands of the officer in respect thereto." By the next section it is provided that arrests for criminal offenses and to prevent breaches of the peace may be made at any time and place.

By Section 1265, Hemingway's 1927 Code, Section 1447, Code of 1906, it is provided that an officer or private person may arrest any person without warrant for an indictable

offense committed, or breach of the peace threatened or attempted in his presence, or when a felony has been committed, and he has reasonable ground to believe the person proposed to be arrested to have committed it, or on a charge made upon reasonable cause of the commission of a felony by the party proposed to be arrested. And in all cases of arrests without warrant, the person making such arrest must inform the accused of the object and cause of the arrest, except when he is in the actual commission of the offense, or is arrested on pursuit. This last section enlarges the common law, in that it permits arrests for any misdemeanor committed in the presence of an officer, and is not limited to offenses constituting a breach of the peace. It is generally held by authorities that it is competent for the Legislature to so embrace all offenses amounting to misdemeanors when committed in the presence of an officer. But it cannot enlarge the right of an officer to arrest for offenses not committed in his presence. The Legislature may reduce a felony at common law to a misdemeanor by statute, or may make a misdemeanor a felony by statute, or may create new offenses; and the peace and order of the State may be promoted by so doing without endangering the liberties of the people.

It is very important for the officers especially to understand their right in this regard, as they are subject to liability and damages resulting from violation of the law, and they may be resisted in cases where they have no lawful authority by the citizen to any extent short of taking life.

As to the right to enlarge misdemeanors for which arrest may be made at the common law, see 2nd R. C. L., page 452, 84 Am. St. Rep. 682, 51 L. R. A. 207, and case note. The same rule exists in the United States government under the Fourth Amendment to the Federal Constitution. The United States Supreme Court held that an arrest cannot be made for a misdemeanor not committed in the presence of the officer. In *Kurtz vs. Moffett,* 115 U. S. 487, 29 L. Ed. 458, 6 Sup. Ct. 141, the Court said:

"If a police officer, or a private citizen, has the right, without warrant or express authority, to arrest a military deserter, the right must be derived either from some rule of the law of England, which has become part of our law, or from the legislation of Congress. By the common law of England, neither a civil officer, nor a private citizen, has the right, without a warrant, to make an arrest for a crime not committed in his presence, except in the case of felony, and then only for the purpose of bringing the offender before a civil magistrate."

See also the case of *John Bad Elk vs. United States,* 177 U. S. 529, 20 Sup. Ct. 729, 44 L. Ed. 875, wherein the Court said:

"At common law, if a party resisted arrest by an officer without warrant and who had no right to arrest him, and if in the course of that resistance, the officer was killed, the offense of the party resisting arrest would be reduced, from what would have been murder if the officer had had the right to arrest, to manslaughter. What would be murder if the officer had the right to arrest might be reduced to manslaughter by the very fact that he had no such right. So an offender, at common law, was not authorized to make an arrest without a warrant, for a mere misdemeanor not committed in his presence."

See other authorities collected in *Moore vs. State,* 138 Mississippi, at page 168, 103 So. 489.

By Section 1266, Hemingway's 1927 Code, Section 1443, Code of 1906, it is provided that in making an arrest, an officer or private person, after notice, if admission is refused, may break open a window or outer or inner door of any dwelling or house, in which he has reason to believe the offender sought may be found. See *Monette vs. Toney,* 119 Miss. 846, 61 So. 593, 5 A. L. R. 261, upon the same subject.

By Section 1267, Hemingway's 1927 Code, Section 1449, Code of 1906, it is provided that if an offender escape or be rescued, the person from whose possession or custody he escaped or was rescued, may immediately pursue and retake him at any time and in any county without warrant. See also *Brown vs. Weaver,* 76 Miss. 7, 23 So. 88; *State vs. Cunningham, et al,* 107 Miss. 140, 65 So. 116, 51 L. R. A. (N. S.) 1179 and note.

By Section 1268, Hemingway's 1927 Code, Section 1450, Code of 1906, it is provided that every person making an arrest shall take the offender before the proper officer without unnecessary delay for examination of his case.

By Section 1269, Hemingway's 1927 Code, Section 1451, Code of 1906, it is provided that officers and others making arrests as authorized by law shall not be liable on account thereof, civilly or criminally, notwithstanding it may appear that the party arrested was innocent of any offense. At common law, a person was not liable if the arrest was made upon a warrant, and this section provides that there shall be no liability if the arrest was authorized. The section must be understood, though, in the light of what has been said before, and construed in the light of Section 24 of the Constitution of 1890, giving to every person the right or

remedy for any injury done him, his lands, goods, or reputation. See "Mississippi Constitutions," pages 123-4, and the authorities there cited.

Under Section 1270, Hemingway's 1927 Code, Section 1452, Code of 1906, it is provided that when an accused person escapes to another county, a warrant issued by a justice of the peace in the county where the offense was committed, shall authorize the arrest of the criminal and his removal to the county where the case is triable.

By Section 1272, Hemingway's 1927 Code, Section 1454, Code of 1906, an officer may pursue and apprehend a criminal in any county and take him to the county where the offense was committed.

By Section 1273, Hemingway's 1927 Code, Section 1455, Code of 1906, it is the duty of the sheriff, coroner, justices, constables and all other civil officers of the county, and of every police officer of any town, city or village, when they know or have reason to believe any person to be guilty of a violation of law in reference to gambling, gaming, or operating a bucket shop, or any business dealing in contracts commonly known as "futures," to apprehend such person, with or without a warrant, and bring him before some officer having jurisdiction thereof, and to appear and prosecute such offender, and for that purpose, any such officer, if he know or have reason to believe that gambling is being carried on in any house, room or place, may lawfully break into the same, with or without warning to the persons therein. It would be a safe course for any officer undertaking to act under this statute to first make affidavit and get a warrant, if the offense is not committed in his presence. Section 23 of the Constitution legally prohibits his doing otherwise. Neither under that section of the Constitution could the officer break into a house without the offense is being committed in his presence or hearing, it being beyond the power of the Legislature to dispense with the affidavit and warrant as to misdemeanors not committed in the officer's presence or hearing. Whenever an officer or person makes an arrest without a warrant, such officer or person should speedily go before a justice of the peace, or other officer authorized to try offenses, and make affidavit of the offense and procure proper papers.

By Section 1279, Hemingway's 1927 Code, Section 1460, Code of 1906, it is provided that any conversator of the peace to whom it is made to appear by affidavit that there is reasonable ground to believe persons are about to enter

into a prize fight may issue warrant to any sheriff, constable, or proper officer for the arrest of such persons, which warrant shall be served by the officer to whom delivered, and executed in any county of the state, whether the officer be of such county or not. This statute gives an officer the right to go beyond the confines of his county to execute warrants, and is, no doubt, constitutional.

There are various other provisions by which a party may be arrested upon warrant issued by a conservator of the peace, or judge of a court, such as requiring one to give bond to keep the peace, proceedings for dealing with vagrants, and proceedings dealing with attachments, and enforcing judgments of courts of competent jurisdiction.

ARREST OF INSANE PERSONS

Insane persons may be arrested with or without warrant, when such persons are dangerous to themselves or to the public. 5 C. J. 421, but they are entitled to have protection from arrest without warrant when they are harmless, and persons undertaking to restrain them of their liberty without a warrant based upon affidavit will be subject to damages for so doing. *Took vs. Dean,* 108 Mass. 116, 11 Am. Rep. 323. By statute, proceedings are provided by law for the arrest of dangerous lunatics or insane persons, and for trial of such, and unless the person is violent or dangerous, it is unsafe to undertake to arrest him and restrain him of his liberty. An insane person who has been tried under the statute and found to be insane, and has been committed to an institution, cannot be arrested and taken from such institution on a criminal charge, even amounting to murder. See *Mabry vs. Hoye,* 124 Miss. 144, 87 So. 4. On the other hand, it has been held by the Supreme Court of this state that where a person has been tried in the circuit court and convicted of a felony, that proceedings de lunatico inquirendo cannot be resorted to in an effort to take him from the custody of the officer to whom he has been committed. *Hawie vs. Hawie,* 124 Miss. 473, 91 So. 131.

WHO MAY MAKE ARRESTS

Under the laws of the State of Mississippi, the sheriff, deputy sheriff, constable, marshal, and, in cities, policemen, are entitled to, and are required to make arrests in proper cases, with or without a warrant, according to the rules above stated. But, by Section 167 of the Constitution, it is provided that: "All civil officers shall be conservators of

the peace, and shall be, by law, vested with ample power as such." The Constitution does not define "conservators of the peace," but, at common law, they were officers having special charges to see that the peace was kept. Prior to the reign of Edward the Third, who created justices of the peace, there were certain persons interested in keeping the peace, of whom there were two classes, one of which had the power annexed to the office, and the other had it merely by itself, and were called wardens, or conservators of the peace. See 110 A. S. R. 639, 12 C. J. 522. They could commit all breakers of the law, but could not try them. In other words, they could arrest for felonies and breaches of the peace and carry the offenders before the proper officers for trial. By the statutes referred to above, they are especially charged with the duty of arresting offenders, but by the Constitution, they are given the power and charged with the duty, of arresting for all crimes committed in their presence, and for felonies actually committed not in their presence where they have "probable cause" to believe that a particular person has committed a felony. A private citizen may also make arrests for these offenses, but is under no obligation to do so, but a conservator of the peace, that is to say, any civil officer, has the power, and is under the duty, to do so. They have power as conservators of the peace to take affidavits and to issue warrants for arrest, on the affidavits of citizens, for breaches of the peace, whether committed in their presence or not, and it is probable that they could fix bail in bailable cases less than felonies, so that the officer making an arrest under their direction could admit to bail. Any citizen arrested for a misdemeanor is entitled to bail, also for felonies less than capital, as a matter of right; and even in capital cases a citizen would be entitled to bail if the proof is not evident, or the presumption great, by which is meant that the evidence must be so strong as to exclude reasonable doubt. If there is reasonable doubt of the guilt, bail should be allowed. The term, "presumption great," refers to the evidence, and indicates such a state of facts where the circumstances are so conclusive as to practically exclude every reasonable theory of innocence. At common law, a person was not entitled to bail after conviction of a felony less than capital, but by statute, Sections 43 and 44, Hemingway's 1927 Code, all felonies less than capital are bailable pending appeal from the circuit court to the supreme court. When a person is granted bail, he is, in legal effect, placed

in the custody and control of his bailsmen, and they have the right to arrest him or take charge of him at any time, either with or without warrant, and surrender him to the custody of the sheriff or officer having control of the prisoner in the absence of bail. See 3 R. C. L. 50, Sec. 60; *Id* 58, Sec. 69; 134 A. S. R. 886, 27 L. R. A. (N. S.) 333; Ann. Cas. 1913E, 453; 25 A. S. R. 524; 10 Am. Dec. 110; 2 Am. Dec. 726. The prisoner in such case being in the possession of his bondsmen or bailsmen, they have a right to go into another jurisdiction and arrest their principal, the prisoner, without extradition or other legal warrant, but they have no right to go into a foreign country and arrest without extradition proceedings. Within the different states of the Union, however, they have such right, and may take charge of their prisoner without warrant, wherever he may be found, and carry him to the proper officer and surrender him. 3 R. C. L. 59, Sec. 70; *State vs. Lingsfelt,* 14 L. R. A. 605; 3 A. L. R. 188 and note; *Taylor vs. Tainter,* 16 Wall (U. S.) 366, 21 L. Ed. 287; 3 A. L. R. 184.

In making an arrest, an officer may use all force necessary for that purpose, where the arrest is lawful; and in felonies, may even take life if it is necessary to make arrest or prevent an escape, 2 R. C. L. 471, 76 Miss. 14, 23 So. 388; but he may not use deadly weapons dangerous to life in so doing for a crime less than a felony, and if he uses such deadly weapon, and kills a person sought to be arrested, it will be a crime amounting to manslaughter. *Brown vs. Weaver,* 76 Miss. 7; 23 So. 398; 71 A. S. R. 512; 42 L. R. A. 473; *Holloway vs. Moser,* 193 N. C. 185, 136 S. E. 375; 50 A. L. R. 262; Note to 3 A. L. R. 1174, et seq.; *Wilkinson vs. State,* 143 Miss. 324; 108 So. 711, 46 A. L. R. 895, and *Wallace vs. State,* 21 So. (Miss.) 662. The officer, however, is not the final judge of the force to be used, and whether or not it was necessary, and he is liable on a criminal prosecution, or a civil suit, or both, if he uses unnecessary force, harshness or brutality in making an arrest. It is, therefore, a question for the jury finally to pass upon under instructions from the court. *Franklin vs. S. C.,* 218 U. S. 161, 54 L. Ed. 980. After a person has been arrested for a misdemeanor, or been convicted for a misdemeanor and placed in the custody of overseers or other persons working prisoners, they have no right to kill to prevent escape, or to compel the prisoner to return to his employment. *Mack Kelly vs. State,* 128 So. (Miss.) 194. As stated above, an officer may make an arrest for a misdemeanor committed

in his presence without any warrant, but the misdemeanor must be committed in his presence so as to enable him to see, or hear it, so he may not have to depend upon information derived from another person. *Hattiesburg vs. Beverly,* 123 Miss. 759, 86 So. 590, 1 A. L. R. 568. When an officer or a private person undertakes to arrest a person, they should disclose their authority to such person to be arrested, and failing to do so, they may become trespassers. If they are trespassers, they are subject to a suit for damages to the person injured, 5 C. J. 389, et seq.; 2 R. C. L. 464, Sec. 22 et seq.; 40 A. L. R. 62 and note, and 54 and note, and an officer cannot arrest a person for an offense committed in his presence unless he is cognizant of the offense by some of his senses. For instance, he cannot arrest a person because he believes he has a concealed weapon or concealed liquor upon his person, even if it turns out after his arrest that he has such weapon or liquor, or other unlawful weapon or instrument upon his person. *State vs. Puckett,* 99 Georgia 12, 25 S. E. 608, 59 A. S. R. 226; *Robertson vs. State,* 29 So. 535, 43 Florida 156, 52 L. R. A. 751.

An officer making an arrest under the law authorizing him to do so should, at once, conduct the prisoner to a justice of the peace or other officer entitled to investigate the charge, and there prefer the charge by affidavit against the prisoner, and procure a warrant for his detention. Detaining a prisoner an unreasonable time after his arrest is trespass, and will subject the officer to damages at suit of the prisoner. 2 R. C. L. 486, Sup. Vol. 1, page 479; *Wheeler vs. Nesbitt,* 24 How. (U. S.) 544, 16 L. Ed. 765; Ann. Cas. 1914A, 716 and note; *Bryan vs. Comstock* (Ark.), 9 A. L. R. 1346, and see also 51 L. R. A. 193 and case note.

When a person has been, by an officer, arrested legally, such officer has the right to make a search of his person for the purpose of depriving him of the means of escape, and of securing evidence of the crime for which he is arrested. This search is limited in its extent, and the right of the officer to make it is discussed in *Tolliver vs. State,* 133 Miss. 789, 98 So. 342; 2 R. C. L. 467, Sec. 25; R. C. L. Sup., Vol. 1, 480; *Webb vs. Sardis,* 143 Miss. 92, 108 So. 442 and case note to 32 A. L. R. 660.

An officer who has a warrant for the arrest may enter a house where he has good reason to believe the person sought to be arrested may be, and search therein for such person and arrest him, if found, but he should give notice of his purpose, and the name of the person sought to be ar-

rested, before doing so. But if, on demand, the house is not opened after such information, the officer may break the doors and enter therein, and is not subject to damages for so doing. *Monette vs. Toney,* 119 Miss. 846, 81 So. 593.

The reason for arresting for a felony not committed in the presence of the officer, but actually committed, where the officer has probable cause to believe that the person arrested has committed the offense, is that, at common law, felonies were punished with such severity, followed by confiscations of property, and corruption of blood, so that neither the prisoner, nor his descendants, could inherit any property of the convicted relative, and the rule was so harsh that perpetrators of felonies usually resorted to flight. A misdemeanor was considered a trivial matter, and was not thought sufficiently serious to warrant seizure of the person without warrant, unless it amounted to a breach of the peace, and was committed in the presence of the officer. By statute, felonies, in many cases, have been reduced to misdemeanors, and some misdemeanors have been increased to felonies. The distinction is still important, but not nearly so much so as it was in England prior to the Revolution.

PRIVILEGE FROM ARREST

Certain persons are privileged from arrest, with certain exceptions, growing out of public policy, and where such privilege is known, neither an officer, nor a private person, should make an arrest without a warrant, nor even with a warrant, when conditions are such as might injure the public. Under Section 48 of the Mississippi Constitution it is provided that: "Senators and Representatives shall, in all cases except treason, felony, theft, or breach of the peace, be privileged from arrest during the session of the Legislature, and for fifteen days before the commencement and after the termination of each session." And a similar provision is in the Federal Constitution. By Section 102 of the State Constitution, electors, in all cases except treason, felony or breaches of the peace, are exempt from arrest during their attendance at elections and in going and returning therefrom. Under Section 220 of the State Constitution, the militia are exempt from arrest during their attendance on musters, and in going and returning from same, except in cases of treason, felonies, or breaches of the peace. These sections should not ever be treated as personal privileges, but should be treated as privileges in behalf of the public, and for the public good. Consequently,

an officer should not make an arrest in these cases where he knows the persons to be arrested enjoy or may claim the privilege. In the cases of Legislators and Congressmen, they must be free from unwarranted vexation and interference during the sessions, so that they may give their calm, deliberate judgment and thought to their public duties. In the case of electors, there should be no interference with the free elections provided by law. The public welfare depends upon the proper selection of public officers, and this right of selection is very important to the public, as well as to the voter. If a person might be arrested while attending an election, or while going to an election, and returned for trial and punishment, he might be prevented from exercising his right, and it might be used as a means of intimidation, and might be hurtful to the public. In the case of the militia, it is important because in times of disturbance, when the militia are needed, or may be needed, at any moment, if they might be arrested and prevented from attending upon their military duties, and from being trained for service, thus interrupting the ordinary process of government, it might result in the militia being ineffective conservators of the peace. There is no reason why a mere misdemeanor cannot wait until an appropriate time when the arrest and trial may not interfere with duty. By naming the exceptions, treason, felony, or a breach of the peace, it would appear that arrest could only be made for those particular crimes, and the general rule of construction is that where a statute, or its construction, enumerates certain exceptions that all things intended to be excepted are named in the enumeration, or where there is a grant, the things granted in express terms preclude the presumption of a grant of other things. *State vs. Henry,* 87 Miss. 125, 40 So. 152, 5 L. R. A. (N. S) 340.

However, the United States Supreme Court, in construing a Federal provision for exemption of Senators and Representatives from arrest, has held that the section only excepted from arrest on civil process, and that it did not apply to criminal arrest. That court construed the term, "breach of the peace" to embrace all crimes. It would appear from the rule of construction that, the exceptions being from all arrests except for treason, felonies, or breaches of the peace, all other crimes than those named fall within the privilege. The definition of the United States Supreme Court seems to be directly contradictory to the holding of the English court in 1765, just prior to the Revolution, in

the case of *King vs. Wilson,* 2 Wilson 151, 95 English Reprint 737, wherein the court held that the arrest of a member of Parliament for a misdemeanor, not a breach of the peace, violated the privilege, and that the terms, "breaches of the peace," contemplated actual breaches of the peace, and not the general status designed to promote the general peace and order of the country. See also 9 C. J. 386, *Rhodes vs. Walsh,* 23 L. R. A. 632.

In the case of *State vs. Polacheck,* 101 Wisconsin 427, 77 N. W. 708, it was held that a felony created by statute after the enactment of the Constitution granting a privilege did not authorize arrest, although the crime for which the arrest was made was constituted a felony after the Constitution was enacted.

It appears to me that the sound rule would be to make the privilege prevail in all cases not named in the statute, and to make it not prevail as to offenses named in the statute wherever the offense was made such by statute after the enactment of the Constitution. This would promote the public policy and tend to prevent the commission of crimes of gravity. The legislative power to classify crimes and make them felonies or misdemeanors should be held within the purview of the constitutional provision. The courts, in some cases, have held that where an arrest is made in violation of the privilege that no action will lie therefor. Other authorities have held that the accused must claim the privilege at the time of the arrest in order to hold the officer liable for making the arrest. *Smith vs. Jones,* 76 Maine 138, 49 Am. Rep. 598, and *Leger vs. Warren,* 51 L. R. A. 193, and case note appended to that case.

It would also seem that Section 24 of the State Constitution gives a right of action for arrest in violation of the privilege from arrest in certain instances, the same as any other illegal arrest. See "Mississippi Constitutions," pages 123 to 128, and especially the authorities cited at page 128.

In addition to the privilege above named, attorneys attending court are usually privileged from arrest except for breaches of the peace and felonies. 6 C. J. 616. In addition to officers named who may make arrests, and offenses for which arrests may be made, under certain conditions, army officers may arrest citizens or members of the army, for military and possibly other offenses. In re Attorney, 119 Fed. 231, and cases collected in "Mississippi Constitutions," pages 729 to 749. I call especial

attention to one of those cases, *Frank vs. Smith,* 142 Ky. 232, Ann. Cas. 1912D, 319, in which the law under the authority of the Governor, is well discussed, and in which opinion the Colorado case of *Re Moyer,* 12 L. R. A. (N. S.) 997, 35 Colorado 159, 117 Am. St. Rep. 189, is criticised, as is also the Pennsylvania case of *Com. vs. Shortall,* 206 Pa. St. 165, 55 Atl. 952, 98 Am. St. Rep. 759, 65 L. R. A. 193, in which cases the courts held that in certain emergencies the civil law was suspended by military orders.

RIGHTS AND DUTIES OF CITIZENS WITH REFERENCE TO ARREST

Every person is subject to arrest under given circumstances, and if the arrest is legal he must submit thereto, 84 A. S. R. 698; 2 R. C. L. 474, Sec. 32; but he may resist an illegal arrest and use such force as may be necessary to prevent an illegal arrest. *Id.* If there is a known officer, or if the officer has a process duly issued, although void, it is highly imprudent to exercise the right, but the citizen should submit and resort to the appropriate legal proceedings. It is not permissible to arm for the purpose of resisting a legal arrest, and in case of a felony, one so armed and resisting authority may not use a weapon even in defense of his life. *Tolbert vs. State,* 71 Miss. 179, 14 So. 464; 42 A. S. R. 454. See, generally on right to resist arrest, *Galloway vs. Tenn.,* L. R. A. 1918D, 975 and note. See also *Wilkerson vs. State,* 143 Miss. 324, 108 So. 711, 46 A. L. R. and note. "Every citizen is bound to assist a public officer in making an arrest when called upon to do so, 15 A. S. R. 266, 18 Ann. Cas. 931 and note, and at common law it was an offense for any person wilfully to disregard the summons of the sheriff to render assistance in apprehending a felon. A sheriff has authority orally to summon a *posse comitatus* in making an arrest for felony, and such persons are given the same protection which surrounds him while acting in concert with the sheriff and actually engaged in endeavoring to arrest the offender." 2 R. C. L. 491.

Where a warrant is legally issued and is valid on its face the officer is protected in making an arrest, although the charge is not pressed or is dismissed. *King vs. Weaver P. Corp.,* 127 So. 718. The officer is protected when acting under a valid warrant and it is advisable in all cases that will admit of delay that a warrant be procured. In Mississippi, affidavits may be made on information and belief constituting probable cause, *Quintini vs. State,* 76 Miss. 498, 25 So. 365, and an officer having probable cause as herein-

before defined may make it on credible information which he believes to be true; and so may any citizen. But care should be taken that there be credible information or else an action of false malicious prosecution may lie. See *Berry vs. Priddy,* 126 Miss. 125, 88 So. 517. It is a safe rule for citizens to go before proper officers and procure warrants before undertaking to make arrests, although to prevent breaches of the peace and felonies, or to arrest felons liable to get away, the citizens should exercise their right to arrest without waiting for a warrant.

This discussion of lawful and unlawful arrest is far from complete, and the subject could easily be greatly extended and numerous cases discussed which are not referred to here, but it is impossible in the length of a magazine article to discuss the matter fully.

I hope that this article and the cases referred to may be helpful to the Bar and the State. I submit it with diffidence to the judgment of the profession.

THE COURT SYSTEM OF MISSISSIPPI†

By A. B. Butts*

In five American states there is still to be found the old English plan of two systems of courts, one for the administration of the rules of equity and another for the trial of common law actions. These states are Delaware, New Jersey, Arkansas, Tennessee, and Mississippi.[1] The sharp distinction between courts of common law and equity is perhaps nowhere more pronounced than in the State of Mississippi.

Throughout the history of Mississippi—except for two brief periods—the first four years of statehood,[2] and again from 1856 to 1869,[3] the courts of common law and the courts of equity have existed as separate tribunals. At the present time there is almost never heard from the bench or the bar a suggestion for a merging of the two types of courts.[4]

I. Courts under the constitution of 1817

The system of courts under the first constitution of the state may be briefly outlined as follows:

(1) A supreme court of four judges, who were also the superior court judges;
(2) A superior court, having both common law and equity jurisdiction, for each of the four districts into which the state was divided;
(3) After 1821, one chancery court with state-wide jurisdiction;
(4) County probate courts;
(5) Justice of the peace courts.

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1 Vermont has separate courts but the same judge presides in each. In Alabama the courts were consolidated in 1915; see Alabama General Acts, 1915, pp. 279, 598, 608, 830.

2 Prior to legislative enactment establishing a chancery court.

3 During this period chancery terms were held in each county by the circuit judges.

4 In the 1930 session of the legislature a bill for the merging of the courts was introduced in the House of Representatives by Mr. Lawrence Kennedy; the committee to which the bill was referred voted unanimously against it. See article by Judge V. A. Griffith, "Should the Court of Chancery Remain Separate," in Mississippi Law Journal, May 1930.

The trial courts and supreme court were not separate in the first period of statehood. This was merely a continuation of the system which had operated under the territorial government.[5]

The fifth article of the Constitution of 1817 required a superior court for each county, to be held by a circuit judge; and a supreme court to be composed of the circuit judges. Under this constitution a supreme court was organized January 21, 1818.[6]

The Constitution of 1817 provided that[7]

"The judicial power of this state shall be vested in one supreme court, and such inferior courts of law and equity as the legislature may, from time to time, direct and establish."

The constitution provided for the appointment of not fewer than four nor more than eight judges of the supreme and superior courts, and made further provision that "the judge whose decision is under consideration in the supreme court shall not constitute one of the court to determine the question of such decision; but it shall be the duty of such judge to report to the supreme court the reasons upon which his opinion was founded."[8]

The state was divided into four districts or circuits, each containing three to six counties, and one judge was assigned to each circuit. The judge was required, after his appointment, to reside in the district.[9] A superior court was held in each county in the state at least twice a year, and the judges were authorized to hold courts for each other when they should deem it expedient or when they were directed by law so to do.[10] The superior courts were by the constitution given original jurisdiction in all criminal cases and in civil cases involving a controversy in excess of fifty dollars.[11]

As to chancery courts, the first constitution of the state authorized the legislature to "establish a court or courts of chancery, with exclusive original equity jurisdiction," with the further provision that "until the establishment of such court or courts, the said jurisdiction shall be vested in the superior courts respectively."[12]

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5 Hutchinson's Mississippi Code, 1798-1848, Ch. 55, p. 790, court organization during the territorial period.

6 Constitution of Mississippi, 1817, Art. V, Secs. 2 and 5.

7 Constitution of Mississippi, 1817, Art. V, Sec. 1.

8 Constitution of Mississippi, 1817, Art. V, Sec. 2; Poindexter's Mississippi Code, 1824, Ch. 15, p. 149.

9 Constitution of Mississippi, 1817, Art. V, Sec. 3; see 84 Miss. 536.

10 Constitution of Mississippi, 1817, Art. V, Sec. 5.

11 Constitution of Mississippi, 1817, Art. V, Sec. 4.

12 Constitution of Mississippi, 1817, Art. V, Sec. 6.

On November 27, 1821, an act was passed by the legislature for the establishment of the separate superior court of chancery.[13] Prior to the Constitution of 1817, under the territorial judicial system, the superior courts were sometimes called superior courts of law and equity, and they administered equity according to the English rules. This practice was continued until 1821,[14] when Joshua G. Clark, then a superior judge, was selected as first chancellor of the state.

Judge V. A. Griffith has called attention to the influence on early chancery practice in Mississippi of the written opinions of Chancellor James Kent of New York, who when a member of the Supreme Court of New York after 1798 introduced the practice of delivering written opinions, and who, after he became Chancellor in 1814, produced a remarkable series of written opinions in equity. Judge Griffith says:[15]

"The extent of the aid derived therefrom, and of the influence exerted thereby, in our own state may be appreciated when it is mentioned that from 1821 to 1848 the chancellors of Mississippi after setting forth, as the procedure of the court, those particular rules required by our own separate situation, maintained as a governing provision the following Rule 40: 'The general principles and mode of proceeding under the foregoing rules shall be conformable to the practice of the State of New York so far as same may not be inconsistent with the rules hereby established.' "

Under the first constitution there was but one chancery court for the whole state, and it held its sessions at the state capital and at one or two other places in the state. The inadequacy and inconvenience of this was responsible for bringing about important changes in the organization and work of the chancery courts under the second constitution of the state, adopted in 1832. A separate court of chancery was then established, but in addition the circuit courts of each county were also given equity jurisdiction in all cases involving five hundred dollars or less, and in divorce proceedings and the foreclosure of mortgages.

The first constitution gave to the legislature power to establish in each county a court of probate "for the granting of letters testamentary, and of administration, or orphans' business, for county police, and for the trial of slaves."[16] The early probate courts were variously called:

13 Poindexter's Mississippi Code, 1824, Ch. 12, p. 84.

14 Stark's Heirs vs. Mather, 1 Miss. 181.

15 V. A. Griffith, Mississippi Chancery Practice (1925), Ch. 1, p. 15.

16 Constitution of Mississippi, 1817, Art. V, Sec. 7; see, Act of February 5, 1818, Hutchinson's Mississippi Code, 1798-1848, p. 718; Poindexter's Mississippi Code, 1824, Chapters 9 and 11.

probate courts, county and orphans' courts, orphans' courts, and county courts.[17]

The justice of the peace courts have always been constitutional courts in Mississippi. The first constitution of the state provided in Section 8:[18]

"A competent number of justices of the peace shall be appointed in and for each county, in such mode, and for such term of office, as the legislature shall direct. Their jurisdiction, in civil cases, shall be limited to causes in which the amount in controversy shall not exceed fifty dollars. And in all cases tried by a justice of the peace, right of appeal shall be secured, under such rules and regulations as shall be prescribed by law."

Under the first constitution, judges of the superior courts, and therefore of the supreme court, and the chancellor (under the act of November 27, 1821) were appointed by the legislature, and they were to hold their offices during good behavior.[19] The constitution provided that "no person who shall arrive at the age of sixty-five years shall be appointed to, or continue in, the office of judge in this state."[20] The attorney general of the state, and as many district attorneys as the legislature should deem necessary, were to be selected for terms of four years.[21]

II. COURTS UNDER THE CONSTITUTION OF 1832

The system of courts under the second constitution of the state may be briefly outlined as follows:

(1) A High Court of Errors and Appeals of three judges, elected by districts for six years, with appellate jurisdiction only;
(2) Four circuit courts (increased to eleven by 1840; in 1844 reduced to seven);
(3) One chancery court (1832-1856);[22]
(4) County probate courts;
(5) Justice of the peace courts.

Important changes in the court system of the state were made by provisions of the second constitution. The name of the supreme court was changed to that of High Court of

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17 Hutchinson's Mississippi Code, 1798-1848, Ch. 52, p. 719.

18 Poindexter's Mississippi Code, 1824, Ch. 8 for early statutes on justices of the peace; Planters Bank vs. Coulson, 6 Howard's Mississippi Reports, 395; see Hutchinson's Mississippi Code, 1798-1848, Ch. 50, p. 688 and Ch. 51, p. 705, for system of justice of the peace courts under the territorial government, 1798-1817.

19 Constitution of Mississippi, 1817, Art. V, Sec. 9.

20 Constitution of Mississippi, 1817, Art. V, Sec. 10.

21 Constitution of Mississippi, 1817, Art. V, Sec. 14.

22 With two vice-chancellors, one provided in 1842, another in 1846; the chancery and common-law courts were merged from 1856 until the adoption of the third constitution of the state in 1869.

Errors and Appeals. Complete separation between the supreme court and trial courts was effected. All judges in the state, from the three judges of the High Court of Errors and Appeals to the justices of the peace, were to be elected by the people, giving Mississippi one of the earliest elective judiciary systems in the United States. The High Court of Errors and Appeals was composed of three judges, one elected from each of the three supreme court districts into which the legislature was directed to divide the state for this purpose.[23] The judges of the highest court of the state were no longer to serve for terms of good behavior, but the terms were to be six years, one judge retiring every two years.

The first constitution of the state had not specifically prescribed the jurisdiction of the supreme court. The provision embodied in the Constitution of 1832 was as follows: "The High Court of Errors and Appeals shall have no jurisdiction but such as properly belongs to a court of errors and appeals."[24] Except to hear and determine motions and issues necessary to the exercise of its appellate powers and necessary to the enforcement of its orders, the High Court of Errors and Appeals had no original jurisdiction.[25] The court was required to hold sessions "twice in each year, at such place as the legislature shall direct, until the year eighteen hundred and thirty-six, and afterwards at the seat of government of the state."[26]

Under the first constitution of the state, the trial courts were, until 1822, known as superior courts; after 1822 they were called circuit courts.[27] Under the Constitution of 1832 there were four circuit court districts established by an act of March 2, 1833; in December of the same year the number of circuit courts was increased to six; in 1836, to eight; in 1837, to nine; and by an act of February 19, 1840, the number was increased to eleven. In 1844 the number of circuit courts was reduced to seven, at which number it remained until the adoption of the third constitution of the state in 1869.[28]

The judges of the circuit courts were elected by the qualified electors of each judicial district, were required to

23 Constitution of Mississippi, 1832, Art. IV, Secs. 1, 2, 3.

24 Constitution of Mississippi, 1832, Art. IV, Sec. 4.

25 Watson vs. Williams, 36 Miss. 331; Dismukes vs. Stokes, 41 Miss. 430.

26 Constitution of Mississippi, 1832, Art. IV, Sec. 7; 40 Miss. 29; 41 Miss. 212.

27 Hutchinson's Mississippi Code, 1798-1848, Ch. 53, p. 734.

28 Hutchinson's Mississippi Code, 1798-1848, Ch. 53, pp. 734-735.

reside within the district, and were to hold office for four years.[29]

The jurisdiction of the circuit courts was defined by the constitution as follows:[30] "The circuit court shall have original jurisdiction in all matters, civil and criminal, within the state; but in civil cases only when the principal of the sum in controversy exceeds fifty dollars." Circuit court was held in each county at least twice a year, and the judges might interchange circuits with each other in such manner as prescribed by law.

In 1828 John A. Quitman succeeded Chancellor Clark. Chancellor Quitman was a delegate to the constitutional convention of 1832. As a member of that convention he framed the sections of the constitution relating to the judiciary.[31] The chancery court now became a constitutional court. Section 16 of the Constitution of 1832 was as follows:[32]

"A separate superior court of chancery shall be established, with full jurisdiction in all matters of equity; Provided, however, The legislature may give to the circuit courts of each county equity jurisdiction in all cases where the value of the thing, or amount in controversy, does not exceed five hundred dollars; also, in all cases of divorce, and for the foreclosure of mortgages. The chancellor shall be elected by the qualified voters of the whole state, for the term of six years, and shall be, at least, thirty years old at the time of his election."

The chancery court in Mississippi has remained a constitutional court to the present time, except by constitutional amendment, from 1856 to 1869.

It will have been noted that the first constitution of the state authorized the legislature to establish a separate court of chancery, and at the same time gave the circuit courts chancery jurisdiction; that four years after the adoption of the first constitution the legislature established a chancery court with state-wide jurisdiction. There was dissatisfaction in some parts of the state with the chancery court; efforts were made to abolish the court and vest its jurisdiction in the circuit courts.[33] These efforts were dis-

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29 Constitution of Mississippi, 1832, Art. IV, Sec. 11; Hutchinson's Mississippi Code, 1798-1848, Ch. 53, p. 733.

30 Constitution of Mississippi, 1832, Art. IV, Sec. 14; Swan vs. Buck, 40 Miss. 268.

31 V. A. Griffith, Mississippi Chancery Practice, Ch. 1, p. 16.

32 See, Howard's Mississippi Reports, 856; 11 Smedes & Marshall Mississippi Reports, 58.

33 See, Hutchinson's Mississippi Code, 1798-1848, Ch. 54, pp. 753-754.

continued after the court was, by the second constitution of the state, made a constitutional tribunal.[34]

In connection with this particular period (1832-1869) of the history of the chancery courts in Mississippi, Judge Griffith has observed:[35]

"The special provision with reference to small cases, and as to divorce and mortgages was because it had been found burdensome to the poorer litigants to be required to attend the court of chancery which held its sessions at the seat of government and at only one or two other places in the state. The same consideration caused the creation of the office of Vice-Chancellor in 1842, and the addition of another Vice-Chancellor in 1846 with provisions for the holding of the chancery courts in several different sections of the state, similarly to the present federal court plan; but the business so rapidly grew and transportation facilities were so limited that in 1856 an amendment to the constitution was adopted providing that the chancery courts should be held in each county of the state by the circuit judges."

Amendment 5 of the judiciary article of the Constitution of 1832, adopted in 1856, which for the time merged common law and equity jurisdiction in the state, read as follows:

"Chancery courts with full jurisdiction in all matters of equity, shall be held in each judicial district, by the circuit judge thereof, at such time and place as may be directed by law. The superior court of chancery and the several vice-chancery courts shall continue as now organized, until the first Monday of November, one thousand eight hundred and fifty-seven, for the disposition of cases now pending therein. The legislature shall provide by law for the preservation of the records of the said superior court of chancery, and of said vice-chancery courts, and also for the transfer of all causes that may remain undetermined therein, to other courts for final decision."

Under the second constitution, the county probate and justice of the peace courts remained substantially as constituted under the first constitution of the state.[36]

III. COURTS UNDER THE CONSTITUTION OF 1869

Under the third constitution of the state, the system of courts of the state included:

(1) A supreme court of three judges appointed by the governor for terms of nine years;

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34 V. A. Griffith, Mississippi Chancery Practice, Ch. 1, p. 16; see, Houston vs. Royston, 8 Miss. 543, at p. 550, and Hutchinson's Mississippi Code, 1798-1848, Ch. 54, p. 754.

35 V. A. Griffith, Mississippi Chancery Practice, Ch. 1, p. 16. Judge Griffith says of the elective chancellor under the Mississippi Constitution of 1832: "For the first time in the history of governments it was ordained that the chancellor should be elected by the people."

36 Hutchinson's Mississippi Code, 1798-1848, Chapters 50 and 52.

(2) District chancery courts;
(3) District circuit courts;
(4) Justice of the peace courts.

The Constitution of 1869[37] is known as the Reconstruction Constitution. In 1866 Robert A. Hill was appointed federal judge for the two federal districts of Mississippi. His political associates, who constituted a majority in the convention of 1868, looked to him for advice upon the courts. "He . . . drafted the article on the judiciary," says Judge Griffith, "and in doing so re-established the court of chancery as a separate constitutional court, with district chancellors presiding, and to meet the former objections it was provided that a chancery court should be held in each country."[38]

In the Constitution of 1869 the highest state court again became known as the supreme court.[39] There was a return to the system of appointed judges, and under this constitution the supreme court judges and the circuit judges and chancellors were appointed by the governor with the consent of the senate. This remained the method of selecting the supreme and circuit court judges and chancellors until amendments to the present (1890) constitution were inserted making all judges in the state elective.[40] Under the Constitution of 1869 all judges except justices of the peace were appointive.

The term of office for the three supreme court judges was made nine years, one judge to retire every three years. The jurisdiction of the supreme court was prescribed in terms almost identical to those of the preceding constitution; according to section 4 of the Constitution of 1869, "the supreme court shall have no jurisdiction but such as properly belongs to a supreme court."[41]

The jurisdiction of the chancery courts was greatly broadened by the terms of the Constitution of 1869. The local probate courts which had existed since the establishment of the first constitution, and which had jurisdiction in probate and similar matters, now passed out of existence. Section 16 of the Constitution of 1869 was as follows:[42]

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37 Drafted in 1868; ratified November 1869.

38 V. A. Griffith, Mississippi Chancery Practice, Ch. 1, p. 17; Constitution of Mississippi, 1869, Art. VI, Sec. 17.

39 Constitution of Mississippi, 1869, Art. VI, Sec. 1.

40 Laws of Mississippi, 1916, Chapters 154 and 156.

41 Planters Ins. Co. vs. Cramer, 47 Miss. 200; Brown vs. Carraway, 47 Miss. 668; Hall vs. Wells, 54 Miss. 289.

42 See, Troup vs. Rice, 49 Miss. 248; Smith vs. Everett, 50 Miss. 575; Bell vs. West Point, 51 Miss. 262; Eyrich vs. Capital State Bank, 67 Miss. 60.

"Chancery courts shall be established in each county in the state, with full jurisdiction in all matters of equity, and of divorce and alimony; in matters testamentary, and of administration in minors' business, and allotment of dower, and in cases of idiocy, lunacy, and persons non compos mentis."

The only change of importance relating to the circuit courts was one that affected both those courts and the justice of the peace courts: the jurisdiction in civil matters in the circuit courts was now limited to matters involving more than one hundred and fifty dollars, instead of fifty dollars which had been the jurisdictional amount since the adoption of the first constitution. Therefore, the new constitutional jurisdiction of justices of the peace in civil cases was substantially increased.[43]

IV. COURTS UNDER THE CONSTITUTION OF 1890

The judicial system of the State of Mississippi under the Constitution of 1890, the present constitution, and its amendments, is composed of the following courts:

(1) The supreme court of the state, constituted of six judges elected by the people, two from each district, for terms of eight years;
(2) Seventeen circuit courts;
(3) Eleven chancery courts;
(4) County courts (in the larger counties);
(5) Justice of the peace courts.

THE SUPREME COURT

Section 144 of the Constitution provides that "The judicial power of the state shall be vested in a supreme court and such other courts as are provided for in the constitution."[44] As adopted in 1890 the constitution provided that all judges, except justice of the peace, be appointive; that the number of judges of the supreme courts should be three; that their term of office should be nine years, [45] and that the term of all other judges should be four years.

In 1898 the legislature proposed an amendment to the constitution, making all judges elective and changing the term of office of supreme court judges from nine to eight

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43 Constitution of Mississippi, 1869, Art. VI, Sec. 23.

44 Constitution of Mississippi, 1817, Art. V, Sec. 1; Constitution of Mississippi, 1832, Art. IV, Sec. 1; Constitution of Mississippi, 1869, Art. VI, Sec. 1; Constitution of Mississippi, 1890, Article VI, Sec. 144.

45 Constitution of Mississippi, 1890, Art. VI, Sec. 145.

years.[46] At the next State election, the electorate voted both on the proposal and for State officers. The legislature which convened in 1900, thought the proposal had passed, so by joint resolution inserted the proposal into the constitution as an amendment.

Immediately the constitutionality of the provision came into question, in the case of *State vs. Powell.*[47] Counsel opposing the amendment cited section 273 of the constitution, which requires that when more than one amendment is proposed to the people, the proposals shall be in such form that the electors may vote for or against each proposal separately. Counsel argued that more than one proposal had been submitted—in fact, that four proposals had been—(1) election of supreme court judges, (2) election of circuit court judges, (3) election of chancellors, and (4) provision for party nominations by districts.[48] And counsel argued further that the proposals had not been submitted separately as required by section 273.

The supreme court held that the proposed amendment had failed of adoption;[49] first, because of the foregoing reasons, and, secondly, because only a minority of the electors voting in the election had voted for the proposal. According to section 273 of the constitution "a majority of the qualified electors voting"[50] is necessary for ratification; a majority of electors voting on the proposal had voted for it, but a majority of all voting in the election had not. The court, therefore, held the amendment invalid.

In 1902 the legislature proposed so to change the amending process that a majority of the votes cast "on the question of an amendment"[51] would ratify or reject it. This proposal, however, failed to receive a majority of "the qualified electors voting"; so the method of amending the constitution remained unchanged.[52]

In 1910 the legislature referred to the people a proposal to make the judges of the circuit and chancery courts elec-

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46 Note the following foot-note references, 51-63, citing material which contains chronologically the steps taken in establishing the elective judiciary. Laws of Mississippi, Special Session, 1898, Ch. 83, pp. 97-98.

47 Laws of Mississippi, 1900, Ch. 199, pp. 236-7. State vs. Powell, 77 Miss. 543 (1900), 27 So. 927. See Walter F. Dodd, The Revision and Amendment of State Constitutions, Ch. 4, pp. 212-213.

48 State vs. Powell, 77 Miss. 543 (1900), 27 So. 927.

49 State vs. Powell, 77 Miss. 543, p. 554.

50 Constitution of Mississippi, 1890, Sec. 273.

51 Laws of Mississippi, 1902, Ch. 143, pp. 199-200.

52 For other proposals of the legislature relating to this subject, see Laws of Mississippi, 1908, Ch. 286; Laws of Mississippi, 1910, Ch. 36, pp. 307-8.

tive.[53] The people ratified the proposal, and in 1912 the legislature inserted it into the constitution as an amendment. At the same session, the legislature passed a bill (Senate Bill No. 322), providing for the election of the judges affected by the amendment. The Governor vetoed the bill.

Soon thereafter the Governor made appointment of a chancellor for the term of four years.[54] The senate confirmed the appointment, and the appointee qualified as chancellor; whereupon the attorney general filed a quo warranto proceeding to test the right of the appointee to hold the office.[55] In this case *(Collins vs. Jones)* the supreme court directly reversed the holding in the *Powell* case (rendered thirteen years before), and held that the amendment "might be submitted to the people as a whole, as such amendment contained but one single proposition." In reversing the previous decision (of the *Powell* case), the court said:

"While it is very important that the decisions of the supreme court on constitutional questions should be uniform, harmonious, and consistent, and that an interpretation once deliberately put upon a provision of such an instrument should not be departed from without grave reasons, yet when the court has erroneously interpreted that instrument and no harm can follow the correction of such erroneous interpretation, it is the plain duty of the court to do so."

In his dissenting opinion Judge Sam C. Cook observed that "fourteen years ago this court, by unanimous decision, condemned the precise amendment we are now considering."[56] In 1914 all chancery and circuit court judges in Mississippi became elective.[57]

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53 Laws of Mississippi, 1910, Ch. 358.

54 P. Z. Jones of Brookhaven, Miss., appointed Jan. 18, 1913 to assume duties February 1, 1913.

55 State ex rel Collins, Atty. Gen., vs. P. Z. Jones, 106 Miss. 522 (1913), 64 So. 241.

56 On what constitutes "one amendment" see, Walker F. Dodd, The Revision and Amendment of State Constitutions, p. 179, cited in the Jones case, 106 Miss. 522, pp. 562-565. Subsequent history of the attitude of the court toward the "one amendment" requirement of the constitution is seen in connection with the adoption of the initiative and referendum amendment to the constitution (Laws of 1916, Ch. 159); in State vs. Brantley, 113 Miss. 786 (1917), it was held that only "one general plan or scheme" was involved, and that there was no violation of the constitutional provision; but in Power vs. Robertson, 130 Miss. 188 (1922), the court overruled the Brantley case, and held that the sections of the initiative and referendum amendment "deals with separate matters, and Chapter 159, Laws of 1916, violates Section 273 of the constitution, because . . . not submitted in such form as each might be voted on separately."

57 See, Laws of Mississippi, 1914, Ch. 150 (S. B. No. 90) pp. 194-6, reenacting the statute which had been vetoed by the Governor in 1910. First

In 1916 amendments to the constitution increased the number of judges of the supreme court from three to six,[58] made them elective,[59], changed the term of office from nine to eight years,[60] and authorized the court to sit in two divisions.[61]

The increase in the number of judges was a necessity; the three judges were unable to handle the increasing amount of litigation carried to the court; and the authority to sit in two divisions was also in order to facilitate work. Article VI, section 177b provides:[62]

"The supreme court shall have power, under such rules and regulations as it may adopt, to sit in two divisions of three judges each, any two of whom when convened shall form a quorum; each division shall have full power to hear and adjudge all causes that may be assigned to it by the court. In event the judges composing any division shall differ as to the judgment to be rendered in any cause, or in event any judge of either division, within a time and in a manner to be fixed by the rules to be adopted by the court, shall certify that in his opinion any decision of any division of the court is in conflict with any prior decision of the court or of any division thereof, the cause shall then be considered and adjudged by the full court or a quorum thereof."

The judge of the supreme court who has been for the longest time continuously a member of the court is the chief justice, and when the court sits in divisions the chief justice presides over Division A; the judge who has been next longest time continuously a member of the court presides over Division B.[63]

Important questions arise in regard to the work of an appellate court which sits in divisions. How cases are assigned to the two divisions; whether any types of cases are habitually heard before the court en banc, or may be taken there as a matter of right; whether cases are heard before a division before being heard en banc, and if not, what is the procedure for getting a case heard by the whole court; whether it is possible for attorneys to manipulate successfully to have a case heard before one of the divisions rather than before the other; whether the division plan tends to increase motions for rehearings or suggestion of error; whether as near uniformity of decision is obtained by the

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election for circuit and chancery judges was held in 1914, and these judges assumed office in January 1915.

58 Laws of Mississippi, 1916, Ch. 154.

59 Laws of Mississippi, 1916, Ch. 156.

60 Laws of Mississippi, 1916, Ch. 157.

61 Laws of Mississippi, 1916, Ch. 152.

62 Laws of Mississippi, 1916, Ch. 152.

63 Hemingway's Mississippi Code, 1927, Sec. 3398, the Chief Justice.

court sitting in divisions as en banc—these questions are of importance in the operation of a plan for separate divisions.

Examination indicates that the plan, as established in Mississippi, meets these questions satisfactorily.[64]

Under direction of the court, the clerk once a month makes up the civil record; the cases go to the divisions in the order in which they reach the court. Usually each division has about thirty cases before it. The divisions sit in alternate weeks; that is, division A sits one week and division B the next week. During its first sitting, a division undertakes to consider about two-thirds—about twenty—of its cases; and during its second sitting, the remainder. This refers to civil cases. The criminal docket, which usually averages twenty or twenty-five cases a month, comes up for hearing on the fourth Monday of the month, and the arguments are heard by one division. The records in criminal cases are apportioned out between the two divisions. These cases are in addition to the civil cases assigned to each division.

Only cases involving the death penalty come before the court en banc for argument. Cases, however, that involve the declaration of a statute as unconstitutional must come up before the full court for consideration before the court declares the statute unconstitutional. Cases of constitutionality come before a division in the regular manner. If all the judges of the division think the statute constitutional, they so declare it; but if one or more of them think it unconstitutional, they refer it to the court en banc. If the division has heard arguments, the other division will hear arguments. Then the full court discusses the case and renders decision. In all cases in which there is difference of opinion among the judges of one division as to whether a case should be affirmed or reversed or in which there is a difference of opinion respecting the law applicable to the case, the same procedure obtains. The full court considers the case. A majority is necessary to reverse the opinion of the lower court; but a mere "tie vote" may affirm the case. The judges of the division which has voted to affirm announce the decision according to their views; and the opinion is as binding as a unanimous decision, un-

64 The writer is indebted to Associate Justice George H. Ethridge of the Supreme Court of Mississippi for valuable assistance in the preparation of this part of the discussion.

less and until a majority of the court decides to overrule it.[65]

The court decides when a case will be heard before the whole court, except capital cases in which the death penalty is inflicted; and it determines its procedure in many respects. To quote Justice George H. Ethridge:

"A division of the court will not entertain a motion to transfer to the other division unless one of its members should be disqualified to act in the cause. The court will not entertain a motion for a case to be heard en banc, before the whole court, before it has been considered by either division; but if the court itself deems it proper, on account of the importance of the case, or the questions involved therein, either division may, in its own discretion, remand the cause to the full court, even though there may be no disagreement betweeen the judges of that division."[66]

In many cases the attorneys for some reason, real or imaginary, would prefer to go before one of the divisions rather than the other, but they have no method whereby they can so manipulate the case as to obtain this end. Sometimes a case is advanced out of its proper order because of statutory reasons or because of great importance rather to the public than to the litigants. This is done upon a motion made to advance. Usually the court advances the case to a period for which the docket has not been set, leaving it to be assigned with other cases in its logical order. Sometimes in emergencies, the court sets the case for an earlier date, leaving it however with the division to which it has already been assigned.

The fact that the court sits in divisions apparently does not increase motions for rehearings, or suggestions of error which stand in lieu of motions for rehearing under Mississippi practice. These suggestions of error come in from the losing side in a great majority of cases decided, and are passed on, not by the judge who wrote the opinion, but by another of the same division; that is, this second judge takes the suggestion of error, studies it, and reports it to the division in conference, with his opinion as to whether the suggestion of error should be sustained or overruled or whether the opinion should be modified.

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65 Examination of the first ten volumes of the Mississippi Reports after the court began sitting in divisions (beginning with Volume 107 Mississippi, 1914) shows forty-nine cases decided by the court en banc. These cases constitute about twenty-two per cent of the cases coming before the court. They involved over twenty different subjects. About one-fourth of the cases involved constitutional questions; only three cases were capital cases.

66 George H. Ethridge, Mississippi Constitutions (Jackson, Miss. 1928), Ch. 20, p. 265.

The court-practice of sitting in divisions apparently does not appreciably affect uniformity of decisions.

Whether an appellate court sits in divisions or en banc, questions arise pertaining to the importance of oral arguments, the extent to which court-opinions are one-man opinions, the leniency with which the court will consider points not included in assignments of error, promptness in executing the docket, and the form required in the preparation of briefs submitted to the court. The Supreme Court of Mississippi has met these problems satisfactorily.

As to oral arguments, a member of the court says:[67]

"In practice oral arguments are considered helpful by the court; this is especially true in the conference of the judges. After one judge has taken a record and the briefs and studied them and brought the case into a conference for discussion, the other judges, having heard the oral argument, are in a better position to interrogate the judge who handles the record as to the features of the case which that judge may not deem as important as the other judges who have heard the argument. The cases are here decided usually very shortly after the argument and the arguments are fairly well remembered, especially if the arguments are well made and do not descend too much to details."

The method followed by the court justifies the assertion that as to the conclusions reached and the points of law decided the written opinions of the court are not one-man opinions. The judge who writes the opinion is, of course, allowed considerable latitude in the language chosen to convey the conclusions of the court; but after the opinions are written they are read by the other judges of the division, and if in the opinion of any other judge they are too broad or in any manner inaccurate, the attention of the other judges is called to it, and it is reconsidered, and sometimes the opinion re-drafted. The briefs are not usually read by all the judges of the division. The judge who receives the assignment of the record and briefs generally states the case fully and fairly with his conclusions thereon, and if there is no difference of opinion among the judges the record and the briefs are not read by the other judges; but where there are tendencies to differ, the other judges read the briefs, or the record, or both, and thereafter they again discuss the case. This happens not infrequently. The same procedure is followed in cases considered by the court en banc.

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[67] Associate Justice George H. Ethridge, letter to the writer, March 13, 1930.

The court usually confines its consideration to the points raised in the assignments of error, or the specifications of error, and is liberal in allowing amendments to be filed to them. Up to the submission of the case the lawyer is usually allowed to file a supplementary or amended assignment of error. However, the court will consider points arising in the case that are necessary to be considered to reach the conclusion to which the court is led by the law, whether assigned or not, but this is done only when to ignore these points might result in a decision contrary to law, or in creating a conflict or uncertainty in the law. The court is reluctant to raise and decide points on its own motion, and sometimes members of the court address inquiries to counsel when the discussion of additional points would be helpful to the court.

The supreme court of Mississippi keeps practically abreast of its docket, usually rendering decision within six weeks of the argument or submission of case. In most instances, the court makes decision within two weeks of submission; but in cases involving difficulties and voluminous records, the court sometimes makes decision only after six weeks. Division of opinion among the judges sometimes causes delay. Thus a difference within a division would refer the case to the court en banc; and the court usually could not make decision until the following month. Sometimes, therefore, the court needs more time for decision under the division-plan than it would have needed under the whole court system.

On many court dockets are "dead cases," and these make it appear that the court is further behind in the docket than is actually true. It is desirable to have some method whereby these "dead cases" can be removed from the docket. The Supreme Court of Mississippi seems to have met this situation satisfactorily. To quote from a member of the court:[68]

"We frequently find that cases get upon the docket for submission and argument before the lawyers have prepared their briefs, and at their insistence the cases are sometimes passed to a future day in order to enable them to prepare the briefs; but if a case is placed on the docket and no briefs are filed and no motion has been made to pass the case for additional time, the case is dismissed for want of prosecution, and it can only be reinstated upon the docket by a motion accompanied by an affidavit of counsel setting forth reasons for not filing the briefs, and in

68 Associate Justice George H. Ethridge, letter to the writer March 13, 1930.

addition to that an affidavit that he has a meritorious case, setting forth with particularity the points and facts constituting merit, not leaving it to the judgment of counsel as to whether it is meritorious or not, so that before reinstating the case the judges of the court can see that there is probable reason to believe that the appeal may be entertained with a possibility of a reversal of the judgment of the court below. Of course, we do not often decide whether the case will be reversed or not, should it be reinstated, but occasionally we see that it would be bound to be affirmed at all events and in such cases refuse to reinstate it."

Most supreme courts require that all briefs presented to the court be printed. This is not a requirement in Mississippi. Approximately ten per cent of the briefs filed before the Supreme Court of Mississippi are printed, leaving approximately nine-tenths of the briefs typewritten. It is interesting also to note that generally only one copy of the type-written brief is filed, while occasionally carbon copies are filed for each of the three judges of the division to which the case is submitted. It would seem wise to require the filing of three copies of every brief.[69]

The Supreme Court, under the Constitution of 1890, has "such jurisdiction as properly belongs to a court of appeals."[70] Under this section it has been held that the supreme court has no original jurisdiction, further than to hear and determine all motions and issues necessary to the exercise of its appellate powers and necessary to the enforcement of its orders. The legislature cannot confer original jurisdiction upon the Supreme Court; "the only jurisdiction which the legislature may confer upon the Supreme Court is the jurisdiction to review and revise the judicial action of an inferior court or tribunal, and such incidental jurisdiction of a quasi-judicial character as is necessary to preserve its dignity and decorum and give full and complete powers to its appellate powers."[71]

The method of appellate review in Mississippi involves few technical difficulties. Writs of error have been abolished.[72] The method of taking cases to the supreme court from both circuit and chancery courts, is by petition to the clerk of the lower court. Notice in writing is given

69 See article, "The Brief on Appeal," by Associate Justice W. D. Anderson of the Supreme Court of Mississippi, Mississippi Law Journal, Vol. II, No. 3, February, 1930, pp. 263-270. See, Harris vs. Hazlehurst Oil Co., 78 Miss. 603, 30 So. 273, where briefs are referred to by the court as "models of excellence as supreme court briefs."

70 Constitution of Mississippi, 1890, Art. VI, Sec. 146.

71 Robertson vs. Southern Bitulithic Co., 129 Miss. 453, 92 So. 580; see, Planters Ins. Co. vs. Cramer, 47 Miss. 200, and Brown vs. Carraway, 47 Miss. 668.

72 Hemingway's Mississippi Code, 1927, Vol. 1, Ch. 2, Sec. 7.

the court stenographer, within ten days after the adjournment of court, to transcribe his notes, a copy of this notice being filed with the court clerk. Time for actually taking appeal varies, but in most cases the petition must be filed with the clerk and bond given within six months. The clerk then prepares the record and sends it, together with the original appeal bond, to the Supreme Court, where the case is docketed. Appeals may be taken in all civil cases where the principal amount involved is fifty dollars or more, and in all criminal cases. Appeals may be taken from interlocutory decrees in chancery for the purpose of settling the principles involved, or in exceptional cases to avoid expense and delay.[73] At his discretion the chancellor may or may not allow such appeals; but in case the chancellor deny such an appeal, a judge of the supreme court may nevertheless allow an appeal.[74]

As a rule, the supreme court will reverse and enter final judgment only in cases where the appellant was entitled to peremptory instruction by the circuit court; or where the appellant, admitting as true all proof offered by the appellee, is entitled to win as a matter of law, in chancery matters.[75] If an issue of fact is made that should be passed on by the jury, the supreme court has no right to enter final judgment contrary to the jury verdict, however erroneous that verdict may appear to be unless the verdict is clearly excessive; in this case, the court may order a remittitur.

INFERIOR COURTS

Circuit Courts. Inferior only to the Supreme Court are the circuit and chancery courts. Under section 152 of the constitution, the legislature has divided the law jurisdiction into seventeen circuit court districts. In each district a circuit judge and a district attorney are elected for a term of four years. When the districts were formed, the attempt was made to equalize, as nearly as could be, the work by forming the districts on the probable volume of litigation. With no transfer of judges and with the increase and shifting of population, it sometimes happens that while the docket in some circuit districts is in arrears, judges in other districts find that they may frequently pretermit terms of court with no serious inconvenience resulting to litigants.[76]

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73 Hemingway's Mississippi Code, 1927, Vol. 1, Ch. 2, Sec. 9.

74 Hemingway's Mississippi Code, 1927, Vol. 1, Ch. 67, Sec. 3391.

75 See, V. A. Griffith, Mississippi Chancery Practice, Ch. XLIII, pp. 783-785, and cases there cited, footnotes 6, 7, 8, 9, pp. 784-5.

76 The following data prepared by the Circuit Court Redistricting Committee, as provided by House Bill No. 83, extra session 1929, is of interest.

The constitutional provision defining the jurisdiction of the circuit courts is as follows:[77]

"The circuit court shall have jurisdiction in all matters civil and criminal in this state not vested by this Constitution in some other court, and such appellate jurisdiction as shall be prescribed by law."

The circuit courts are the courts of general jurisdiction. The other courts created, or authorized by the constitution are given jurisdiction of specific subject matter, and have only such jurisdiction as that conferred or necessarily implied.[78] The legislature has conferred appellate jurisdiction upon circuit courts in some instances, notably in appeals from the county courts, in which cases the circuit courts serve the purpose of intermediate courts of appeal. And it has been held proper for the legislature to confer upon the circuit courts special types of jurisdiction, such as the power to try de novo tax assessments appealed to that court from the assessing board.[79] The legislature cannot confer exclusively upon some other court the jurisdiction given by the constitution to the circuit courts, although it may confer concurrent jurisdiction, in such cases, upon a special court.[80]

With the establishment of county courts in 1926 an interesting question arose in regard to appeals to the circuit court under the section of the constitution defining the jurisdiction of circuit courts, a question which is also pertinent to the system of separate common-law and equity courts in the state. The county courts have jurisdiction concurrent with the circuit and chancery courts in all matters of law and equity wherein the amount or value of the thing in controversy does not exceed one thousand dollars. While the circuit courts are given "such appellate jurisdic-

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The seventeen circuit districts embrace from three to seven counties each. Ten counties have two judicial districts, that is, court meets regularly at the county site and at an additional place in the county. In regard to "days of court scheduled by statute," "days court actually held," "days court not held," for the five-year period 1925-1929, the extreme figures are as follows: days scheduled, 1310 days in the fourth district, 838 days in the thirteenth district; court held, 958 days in the fourth district, 368 days in the fifth district; court not held, 710 days in the seventeenth district, 157 days in the fifteenth district. The contrast in population (1920 Census) and area is indicated by these figures: population of the fourth district 188,427, of the twelfth district 63,144; area of the third district 3,687 square miles, of the twelfth district, 1,822 square miles.

77 Constitution of Mississippi, 1890, Art. VI, Sec. 156; 1832, Art. IV, Sec. 14; 1869, Art. VI, Sec. 14.

78 But see, Vinegar Bend Lumber Co. vs. Oak Grove & G. R. Co., 89 Miss. 84, 43 So. 292, where this principle is apparently not followed.

79 Knox, Attorney General vs. Dantzler Lumber Co., 114 So. 875.

80 Montross vs. State, 61 Miss. 429.

tion as shall be prescribed by law," no appellate jurisdiction is by the constitution conferred upon the chancery courts. For this reason the County Court Act [81] provided that all appeals from the county court should be to the circuit court. Thus the circuit court in a county in which there is a county court tries on appeal equity cases of which it has no original jurisdiction under the constitution.

Chancery Courts. The State of Mississippi is divided into eleven chancery court districts; in each district a chancellor is elected for a term of four years. Little change from the provisions of the Constitution of 1869 is made by the Constitution of 1890 pertaining to the organization of the chancery courts. One notable addition, however, was made. Section 147 of the Constitution of 1890 reads:

"No judgment or decree in any chancery or circuit court rendered in a civil cause shall be reversed or annulled on the ground of want of jurisdiction to render said judgment or decree, from any error or mistake as to whether the cause in which it was rendered was of equity or common law jurisdiction; but if the Supreme Court shall find error in the proceedings other than as to jurisdiction, and it shall be necessary to remand the case, the Supreme Court may remand it to that court which, in its opinion, can best determine the controversy."

Two other sections of the constitution have important bearing upon the questions which arise under Section 147. Section 157 of the constitution is as follows:

"All causes that may be brought in the circuit court whereof the chancery court has exclusive jurisdiction shall be transferred to the chancery court."

And Section 162 provides:

"All causes that may be brought in the chancery court whereof the circuit court has exclusive jurisdiction shall be transferred to the circuit court."

Prior to 1890, and the adoption of Section 147 of the constitution, it frequently happened that a cause would be dismissed on appeal because declared to have originated in the wrong court, and this regardless of whether the case had been tried correctly, and the correct result reached.[82] This meant great delay and expense to litigants. "Sometimes," says Justice Ethridge, "the delay defeated the action, because the filing of a suit in a court which had no jurisdiction did not stop the running of the statute of

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81 Laws of Mississippi, 1926, Ch. 131.

82 See 59 Miss. 305 (1881); 78 Miss. 83 (1900); but see, contra, 89 Miss. 865 (1906).

limitations." Of Section 147 of the constitution, Justice Ethridge says:[83]

"This section was placed in the constitution to relieve the litigant from a mistake of judgment by the courts as to which court the case should have been tried in. If the case was correctly tried and all the litigant's rights accorded to him and a correct result reached a judgment must be affirmed by the Supreme Court, although the action should have been brought and tried in a different court. Under other sections . . . when a case is brought in one court but should have been brought in another court, it is the duty of the court to transfer it to the proper court, and to have the issues made up in accordance with the pleadings and practices of such courts; but if the litigant and the judge of the circuit or chancery court mistake the law as to which court it should be brought in and proceed to try the case, and try it correctly and reach the correct result, the Supreme Court must affirm; but if the court finds reversible error other than that of jurisdiction, and it is necessary to remand the case, the Supreme Court should remand it to the court which, in its opinion, can best determine the controversy.

"It is the duty of the courts of original jurisdiction to transfer the cause and not entertain it if they are satisfied it was brought in the wrong court, but the supreme court cannot coerce the performance of this duty. Upon that question their judgment is final, if they try the case correctly and reach the right result. The supreme court has, in my opinion, extended this section beyond its purpose and meaning by holding that where an appeal is granted to settle the principles of a case, that the court cannot on such appeal consider the question of jurisdiction."

As to the efficacy of Section 147, Justice Griffith has said:[84]

"It is sometimes difficult to definitely distinguish whether a particular case is one of law cognizance or whether rather it belongs to equity, and too often after expensive litigation a case would be dismissed on appeal because declared to have originated in the wrong court. Many of the states, for this reason, have combined their courts under codes with a procedure based generally upon that of equity. The real remedy found in our section 147 is so simple and at the same time so completely effective that it arouses astonishment that it was not earlier adopted not only in Mississippi but in all of the states. It removed, and removed finally, all the remaining objections that had ever been made, other than by experimentalists, to the separate court of chancery as a fixed and permanent institution in our state."

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83 George H. Ethridge, Mississippi Constitutions, Ch. 20, pp. 268-269. See dissenting opinion of Judge Ethridge in Talbot & Higgins Lumber Co. vs. McLeod Lumber Co., 113 So. 433, wherein he maintains that the supreme court has extended Section 147 of the constitution beyond its purpose and meaning.

84 V. A. Griffith, Mississippi Chancery Practice, Ch. 1, pp. 19-20.

There have been many decisions construing Section 147 of the constitution.[85] Soon after the adoption of the Constitution of 1890 the Supreme Court held, in the case of *Cazeneuve vs. Currell*,[86] that where the chancery court erroneously assumed jurisdiction of an action for trespass and granted an appeal to the Supreme Court to settle the principles of the case, that this section applied, and that the Supreme Court was powerless to interfere.[87] The holding in this case is still adhered to. To quote certain parts of the opinion in the *Cazeneuve* case:

"The record shows that this suit is really an action of trespass brought in a court of equity. The recovery is sought for an oppressive and excessive levy made by a sheriff on a writ of attachment, and is purely an action for damages for trespass. . . .

"But the court assumed jurisdiction, and, as this is the only error assigned, or apparent, we cannot reverse the decree overruling the appellant's demurrer to the bill of complaint. . . .

"We have here practical authority for the virtual obliteration of the lines of demarkation between courts of law and equity, if the judges and chancellors of the inferior courts choose to disregard, or fail to observe, those distinguishing lines. And this court is forbidden to reverse or annul decrees or judgments rendered in the lower courts, even if there was want of jurisdiction, if no other error than want of jurisdiction is to be found. That diverse and conflicting rules of practice and procedure may obtain in the several districts is plain. The chancery court of one district may assume jurisdiction of common-law causes, and the equity courts of the adjourning districts may refuse to entertain such jurisdiction. In the same district variant and uncertain rules and methods may obtain. The diversities of practice may be found in the same district under different chancellors or circuit judges from time to time presiding therein. It is practically within the power of the chancellors and circuit judges, under this provision of the Constitution, to virtually abrogate the distinction between courts of common-law and equity jurisdiction. We have the singular anomaly of a constitutional scheme of two courts, common-law and equity, and yet with power in the inferior judges to effectually blend the jurisdictions, each in his own district. But, remarkable as the results flowing from this anomaly are, we are not to disregard the plain requirements of the fundamental law. The court below, in the case at bar, clearly had no jurisdic-

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85 70 Miss. 521; 71 Miss. 438; 74 Miss. 307; 74 Miss. 489; 74 Miss. 650; 78 Miss. 83; 78 Miss. 132; 129 Miss. 453. See annotations to Section 147, Mississippi Constitution of 1890, Hemingway's Mississippi Code, 1927, Vol. 1, pp. 263-265.

86 J. F. Cazeneuve et al vs. N. Currell, 70 Miss. 521 (1892-1893), 13 So. 32. See, 113 So. 433, at page 434.

87 The case also holds that the constitutional prohibition, Section 147, applies to appeals from interlocutory decrees involving the question whether the cause was one of equity or law.

tion, and should have sustained the demurrer to the bill, and so have driven complainant to his common-law remedy. But the learned chancellor having entertained jurisdiction, and this being the only error committed, we are forbidden to reverse."

Many interesting questions may arise out of the provisions of Section 147. For example, does Section 147 of the constitution modify the guaranty of jury trial in Section 31 of the constitution? The supreme court has never specifically passed upon this question, but its attitude seems to be forecast by the case of *Talbert & Higgins Lumber Company vs. McLeod Lumber Company.*[88] This was a case at law drawn to chancery by writ of injunction but having no ground of equity to support the injunction. The supreme court ruled in effect that whenever the chancery court took jurisdiction, it should try the case according to chancery procedure notwithstanding that the case be a mere suit at law.[89]

The jurisdiction of chancery courts is defined in Section 159 of the Constitution, as follows:

"The chancery court shall have full jurisdiction in the following matters and cases, viz:

(a) All matters in equity;
(b) Divorce and alimony;
(c) Matters testamentary and of administration;
(d) Minors' business;
(e) Cases of idiocy, lunacy, and persons of unsound mind;
(f) All cases of which the said court has jurisdiction under the laws in force when this constitution is put into operation."

Sections 160 and 161 add further to the jurisdiction of chancery courts. By Section 160 it is provided:

"And in addition to the jurisdiction heretofore exercised by the chancery court in suits to try title and to cancel deeds and other clouds upon title to real estate, it shall have jurisdiction in such cases to decree possession, and to displace possession; to decree rents and compensation for improvements and taxes; and in all cases where said court heretofore exercised jurisdiction, auxiliary to courts of common law, it may exercise such jurisdiction to grant the relief sought, although the legal remedy may not have been exhausted or the legal title established by a suit at law."

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88 113 So. 433 (1927).

89 See dissenting opinion of Justice George H. Ethridge in this case, 113 So. 433, at page 437. Justice Ethridge regrets to see "a construction placed upon our constitution which will enable a chancellor to override the constitution at will." He observes that when a circuit judge entertains a cause in equity he could not deny the right of set-off where that would be proper, on the theory that such procedure was not recognized in the circuit court.

And Section 161:

"And the chancery court shall have jurisdiction, concurrent with the circuit court, of suits on bonds of fiduciaries and public officers for failure to account for money or property received, or wasted or lost by neglect or failure to collect, and of suits involving inquiry into matters of mutual accounts; but if the plaintiff brings his suit in the circuit court, that court may, on application of the defendant, transfer the cause to the chancery court, if it appear that the accounts to be investigated are mutual and complicated."

The legislative tendency is clearly to enlarge the work of chancery courts, beyond, it would seem, the constitutional limitation, and to make it an appellate court (though under the terms of the constitution the chancery court has no appellate jurisdiction) in many proceedings, partly judicial and partly administrative. There are certain functions which are naturally incidental to the administration of justice and which are properly performed by the courts or by the judges, but the legislature has placed upon the chancery courts of Mississippi many duties which are purely administrative or ministerial, which raises the question whether the legislature has the power under the constitution to place these non-judicial duties upon the courts, such, for example, as duties connected with the organization and administration of drainage districts,[90] and the administration of the Childrens' Aid Fund.[91]

Moreover, in determining the jurisdictional limits of the chancery courts, the construction placed by the supreme court of Mississippi upon "all matters in equity"[92] has, inevitably, and rightly no doubt, gone far beyond questions involving trust, account, fraud, mistake, or accident, which constituted the principal subjects of equity jurisdiction in England.[93]

Court Rules. Although there is no centralized authority in the judicial system of Mississippi charged with making rules of pleading and practice for all the courts of the state, the courts do promulgate rules of practice and procedure, and there has been no general tendency on the part of the legislature to restrict the courts to any great extent in the

90 Hemingway's Mississippi Code, 1927, Vol. 2, Ch. 110, Secs. 4771-4775, 4838-4844.

91 Laws of Mississippi, 1928, Ch. 84.

92 Constitution of Mississippi, 1890, Sec. 159 (a).

93 See, Walter F. Dodd, State Government, Second Edition, p. 277; and Simeon E. Baldwin, The American Judiciary (New York, 1905), p. 132; V. A. Griffith, Mississippi Chancery Practice, pp. 24-28, giving an enumeration of the subjects of equity jurisdiction which includes thirty-five principal subjects; Thomas vs. Phillips, 12 Miss. 423.

exercise of this power. The constitution authorizes the legislature to make rules of court for the circuit and chancery courts.[94] No reference was made in the constitution in regard to making rules of procedure by the legislature for the Supreme Court; but by the provisions of the amendment of 1916 authorizing the Supreme Court to sit in two divisions, the Supreme Court possesses broad rule-making power for the regulation of its own business.[95] However, the legislature has assumed that legislative sanction is necessary to enable the Supreme Court to exercise rule-making authority; this is indicated by the following act which delegates to the Supreme Court rule-making power:[96]

"**May make rules and enforce them.**—The Supreme Court shall have power to make such rules in respect to making out records for said court as may be expedient, and may prescribe the form and manner in which records shall be prepared for appeal, and cause the same to be bound, but shall not require any record to be printed; and may enforce its rules by proper fines or by refusal to allow costs to be taxed to the clerks below on records not made out according to the rules, or by refusing to permit such records to be filed. And the court may prescribe the mode of pleading in causes therein, civil and criminal, and the manner of trying the same; and may also establish such rules of practice and proceedings therein as may be deemed necessary and proper for certainty and dispatch of business, and may dismiss causes for non-compliance with any of the rules; but such rules must be consistent with law."

Rules of practice and procedure for the circuit and the chancery courts have been promulgated by these courts, acting under grant of authority by legislative enactment.[97] At the present time the State Bar Association is advocating the vesting of authority either upon the Supreme Court, or upon a rule-making commission, to prescribe all rules of procedure and practice in all courts of the state.

Though the legislature has shown no general tendency to restrict the courts unduly in the making of their own rules of practice and procedure, it has enacted some rules of procedure. To cite an example; prior to the amendment

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94 Constitution of Mississippi, 1890, Art. VI, Sec. 163.

95 Laws of Mississippi, 1916, Ch. 152; Constitution of Mississippi, 1890, Art. VI, Sec. 177b. See, 103 Miss. 903-910, Revised Rules of the Supreme Court of Mississippi, October 7, 1912, especially Rules 1, 6, 7, 14, 20.

96 Hemingway's Mississippi Code, 1917, Vol. 1, Sec. 3190; 99 Miss. 644 (1911).

97 Laws of Mississippi, 1920, Ch. 115, Section 2 reads: "A committee composed of the chancellors and circuit judges is hereby created and charged with the duty of formulating and, as need may arise, from time to time, revising a code of rules of practice and procedure in the circuit and chancery courts."

of 1856 to the Constitution of 1832, which gave to circuit courts equity jurisdiction, the chancellor promulgated all rules of practice and procedure in the chancery court; but after 1856 the rules were prescribed by statutes.[98] These statutory rules were brought forward in subsequent enactments, with minor changes from time to time, but, to quote Justice Griffith:[99]

"With no material changes until by the act of 1916,[100] the regular mode of taking testimony by deposition was changed to that of the oral method in open court, and which was later followed by the Chancery Practice Act of 1924 by which several of the then existing sections of the statutes fitted originally to the deposition method of hearing were re-aligned or re-adjusted to the new method of taking the testimony in open court, and by which, further, some of the more notable and the more useful of the federal equity rules of 1913 were, in a modified form, imported into the practice in this state."

County Courts. Under Section 172 of the Constitution the legislature may create inferior courts. That section reads: "The legislature shall, from time to time, establish such inferior courts as may be necessary, and abolish the same whenever deemed expedient." Numerous courts have been established under this section, such as police courts, mayor's courts, unlawful entry and detainer courts, a special eminent domain court,[101] and various other tribunals exercising judicial or quasi-judicial powers. It is not the purpose here to discuss these courts.

The county courts will, however, be considered. Under the authority granted by this section of the constitution, the legislature in 1926 passed the County Court Act.

Under this statute a county court is established in each county having a population exceeding thirty-five thousand, or having an assessed valuation of real and personal property exceeding seventeen million dollars, providing in either case the county contains a municipality of five thousand or more inhabitants as shown by the federal census of 1920.[102] Any other county in the state may establish a county court. Ten of the eighty-two counties come within the classification in which the establishment

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98 Mississippi Code of 1857, Chapter 42.

99 V. A. Griffith, Mississippi Chancery Practice, Ch. 1, p. 20. See, Pamphlet (August 23, 1927), The Rule-Making Power of the Courts in the Several States, issued by the Committee of the Conference of Bar Association Delegates.

100 Laws of Mississippi, 1916, Ch. 220.

101 Mississippi Code, 1906, Sec. 2885.

102 Laws of Mississippi, 1926, Ch. 131. See, A. B. Butts, The Justice of the Peace—Recent Tendencies, 22 American Political Science Review (1928), pp. 946-53; also in Mississippi Law Journal, November, 1928.

of the county court is mandatory. Three other counties have by election adopted the system, and three counties have by election rejected proposals to establish county courts.[103]

The judges of the county courts must have qualifications of the judges of the circuit and the chancery courts. The county judge is elected, for a term of four years.

The county courts have jurisdiction concurrent with the justice of the peace courts in all matters, civil and criminal; and the county judge has exclusively the jurisdiction previously exercised by the justices of the peace in eminent domain, in partition of personal property, and in actions of unlawful entry and detainer. Furthermore, the county court has concurrent jurisdiction with the circuit and chancery courts where the principal amount involved is one thousand dollars or less. It has no jurisdiction in cases of divorce and alimony, matters testamentary and of administration, minors' business, cases of idiocy, lunacy, and persons of unsound mind.

The county court takes over a good part of the work formerly done in the justice of the peace court. It is submitted that if the county court held sessions in each of the supervisors' districts, instead of at the county court house alone, the court would rapidly supplant the justices of the peace.

Appeals from the county court are to the circuit court, in both common-law and equity cases.

Justice of the Peace Courts. The constitution of 1890 provides for justices of the peace and continues a practice that has obtained through the history of the state.[104] "A competent number of justices of the peace shall be chosen in each county in the manner provided by law, for each district, who shall hold their office for a term of four years." The legislature has provided that at least two justices shall be elected in each of the supervisors' districts, and has provided that the board of supervisors may divide a district into three justice of the peace districts.[105]

The Constitution of 1890 changed some of the provisions of the Constitution of 1869 in respect to the justice of the peace. The chief differences are these: The justice shall serve four years instead of two; and he has jurisdiction in

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103 Biennial Report of the Secretary of State of Mississippi, 1926-27, pp. 156-7; figures are of May 31, 1927.

104 Constitution of Mississippi, 1890, Art. VI, Sec. 171; 1817, Art. V, Sec. 8; 1832, Art. IV, Sec. 23; 1869, Art. VI, Sec. 23.

105 Hemingway's Mississippi Code, Vol. 1, Ch. 42, Sec. 2375.

controversies in which the amount involved is two hundred dollars or less instead of one hundred fifty dollars or less. Further, the Constitution of 1890 gives jurisdiction concurrent with that of the circuit court "over all crimes whereof the punishment prescribed does not extend beyond a fine and imprisonment in the county jail; but the legislature may confer on the justices of the peace exclusive jurisdiction in such petty misdemeanors as it shall see proper."[106]

The justice of the peace is vested with exclusive jurisdiction of all common-law causes where the amount involved is two hundred dollars or less, except in the counties having county courts, for the county court has concurrent jurisdiction with justices of the peace in all matters, civil and criminal. Appeals may be had from all decisions of justices of the peace; all appeals are to the circuit court.[107] Appeals must ordinarily be taken within ten days after the rendition of the judgment in the justice of the peace court.[108] Nevertheless, it is provided that "all cases decided by a justice of the peace, whether exercising general or special jurisdiction, may, within six months thereafter, on good cause shown by petition, supported by affidavit, be removed to the circuit court of the county, by writ of certiorari."[109] All cases carried from the justice of the peace courts to the circuit courts are tried de novo in the circuit courts.

V. Conclusion

To say that the work of the courts of Mississippi is, in the main, done satisfactorily, does not mean that the judicial system of the state might not be greatly improved. Both in organization and procedure there is ample room for improvement. A more complete study of judicial administration in the state, with a view to improvement, is greatly needed.

Some changes which would probably give good results are:

1. The redistricting of the state, making the boundaries of the circuit and chancery courts coterminous, and possibly

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106 Constitution of Mississippi, 1890, Art. VI, Sec. 171.

107 Hemingway's Mississippi Code, 1927, Vol. 1, Ch. 2.

108 Hemingway's Mississippi Code, 1927, Vol. 1, Ch. 2, Sec. 63.

109 Hemingway's Mississippi Code, 1927, Vol. 1, Ch. 2, Sec. 72. Cases may be appealed to the circuit court by writ of certiorari from other inferior tribunals than justice of the peace courts: see, Hemingway's Mississippi Code, 1927, Vol. 1, Ch. 2, Sec. 73, and 85 Miss. 772; 123 Miss. 615; 130 Miss. 188.

increasing slightly the number of chancery districts and reducing somewhat the number of circuit districts.

2. The abolition of the second judicial districts in the ten counties now having two districts.[110]

3. The extension of the system of county courts, with provision that court be held regularly in each of the five supervisor's districts, rather than at the county court house alone, and the abolition of the office of justice of the peace in such counties.[111]

4. The vesting of a greater degree of rule-making power in the courts or in a rule-making commission.

5. The creation and maintenance of a judicial council as a continuous, skilled body to study the court system with a view to suggesting and bringing about improvements.[112]

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110 See footnote 76, above.

111 A constitutional amendment would be necessary to abolish the office of justice of the peace.

112 Beginning less than a decade ago in the United States, about a dozen states now have judicial councils. The genesis of the judicial council idea is the English Rule Committee, originally created by the Judicature Act of 1875. In the Federal System, the Conference of Senior Circuit Judges serves greatly to improve judicial administration, (U. S. Compiled Statutes, 1923 Supplement 1, Secs. 980, 982, 985, 1113A.).

STATUTE OF FRAUDS: WHO IS THE PARTY TO BE CHARGED?

By F. J. Lotterhos*

Although the decisions involving various phases of the statute of frauds probably run into the thousands in the many jurisdictions of this country, yet certain applications of it are by no means definitely settled in particular states. And, in Mississippi, the meaning of the statute has become doubly important from a practical standpoint since 1926, when the simple words, "in writing," were added to Section 4775 of the Code of 1906,[1] for now, if the statute applies at all, and one of the parties has acted through an agent, two writings instead of one will be required. It is the purpose of this article to discuss the rule in Mississippi upon this proposition: In cases involving a contract for the sale of lands, who is the party to be charged, the defendant or the vendor; or, to state it specifically, if the vendor has signed, but the vendee has not, can the vendor enforce the contract against the vendee?[2]

The weight of authority unquestionably is to the effect that the party to be charged is the defendant in the litigation, and that, unless the memorandum has been signed by him, whether vendor or vendee, there can be no recovery.[3]

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1 Chapter 152 of the Laws of 1926.

2 The applicable part of the statute (Chapter 152 of the Laws of 1926, Sec. 3325, Hem. Code of 1927) is as follows: "An action shall not be brought whereby to charge a defendant or other party * * * (c) upon any contract for the sale of lands, tenements, or hereditaments, or the making of any lease thereof for a longer term than one year * * * unless, in each of said cases, the promise or agreement upon which such action may be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some person by him or her thereunto lawfully authorized in writing."

3 27 C. J. 291: "But in the great majority of jurisdictions wherein the statutes require a signing by the party to be charged the person against whom it is sought to enforce the contract by action, whether the vendor or the purchaser, is deemed to be the party to be charged and a signing by him is necessary and sufficient to satisfy the statute." Although many of the cases cited in the footnote to the text just quoted (footnote 47) are not, strictly speaking, authority on the point, since the respective defendants were vendors, yet the *dicta* are so clear and positive that there can be no doubt about the rule in most of those jurisdictions. One of the leading authorities is Harper vs. Goldschmidt (1909), 156 Cal. 245, 104 Pac. 451, 134 Am. St. Rep. 124, 28 L. R. A. (N. S.) 689. This case was a suit for specific performance against the vendee, where he had paid part of the purchase price and accepted a receipt stating the terms of

However, there is a respectable minority view to the effect that the party to be charged is the vendor, the person who is binding himself to pass title to lands, and hence that the vendee is bound to accept title and pay the consideration, although his contract is merely oral.[4] Some of the Mississippi decisions have caused doubt as to what the rule is in this state, and at least one editorial writer has indicated that Mississippi is with the minority.[5] But it is the view of the author of this article that the rule in Mississippi is that of the majority of the courts, and that the cases leave little room for argument. The matter will be viewed from two angles: first, historical and on principle, and, second, the Mississippi cases.

HISTORICAL AND ON PRINCIPLE

The statute of frauds was enacted in England in 1676, and the statutes in this country are modeled after that original one.[6] The first three sections of the English statute apply to transfers *in praesenti.* Section One provides that estates in land created "and not put in writing and *signed by the parties so making or creating the same,* or their agents thereunto lawfully authorized by writing, shall have the force and effect of leases or estates at will only * * *." Section Two creates a certain exception to Section One, which is of no importance with reference to the matter under discussion. Section Three provides that certain estates shall not "be assigned, granted, or surrendered, un-

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sale. The statute in that state provided that contracts within the statute of frauds should be invalid unless "in writing and subscribed by the party to be charged or by his agent." The court held that the statute applied to the vendee as well as the vendor and that there could be no recovery because there was no memorandum or contract signed by the vendee—defendant. The opinion of the court contains a comprehensive review of the statutes and the applicable cases.

4 This rule obtains in Kentucky and Tennessee. The cases are cited in footnote 46 to the text in 27 C. J. 291. The same rule has been adopted in Missouri. Tracy vs. Berridge (1914), 180 Mo. App. 220, 167 S. W. 1176. There are some states in which the statute expressly requires a signing only by the party making the sale. Of course, in these jurisdictions it is not necessary to determine what the words "party to be charged" mean because the statutes do not use that phrase. See footnote 45, 27 C. J. 291.

5 In a comprehensive note on the subject, "Who must sign note or memorandum of executory contract for the sale of real property or chattels within the statute of frauds," in 28 L. R. A. (N. S.) 680, 691, the editor, in writing of the view that the party to be charged is the vendor or owner, which is held by a few courts, says, "The Mississippi cases are somewhat ambiguous on this point." He then discusses Curtis vs. Blair (1853), 26 Miss. 309, 59 Am. Dec. 257; Johnson vs. Brook (1856), 31 Miss. 17, 66 Am. Dec. 547; and Peevey vs. Haughton (1895), 72 Miss. 918, 17 So. 378, 18 So. 357, 48 Am. St. Rep. 592, which will be referred to again in this article.

6 29 Car. II., c. 3.

less it be by deed or note in writing *signed by the party so assigning, granting or surrendering the same,* or their agents thereunto lawfully authorized by writing, or by act and operation of law."[7]

The fourth section of the English statute is the one upon which the Mississippi statute under consideration is based. It provides in part as follows: "That no action shall be brought * * * (4) upon any contract *or* sale of lands, tenements, hereditaments, or any interest in or concerning them * * * unless the agreement upon which such action shall be brought or some memorandum or note thereof shall be in writing, and *signed by the party to be charged therewith,* or some person thereunto by him lawfully authorized."[8]

The English first, second and third sections have not been adopted in Mississippi.[9] These three sections are by their language limited to the present transfer of an estate in real property, and very clearly provide that the deed or instrument of transfer must be in writing and signed by the grantor or person disposing of the title. The fourth section, however, refers to the case of a contract between the owner of land and another containing agreements respectively to sell and buy a piece of land at a future time when the title will actually be transferred. The language used in the first and third sections plainly refers to the person disposing of the property. If the design had been the same in the enactment of the fourth section, similar language would have been used. Instead of that, however, the words "party to be charged" were substituted, thus indicating a different intention from that in the other part of the statute. The words "party to be charged" seem to show by a mere reading of them that the defendant in the particular litigation is referred to. One who disposes of title to property is not being charged with anything, according to the usual meaning of the word, but, on the other hand, a defendant in any suit is always sought to be charged with some duty or liability by the plaintiff.

The reason for this difference made in the language used in the several sections is easy to see. In the case of a present transfer of title there is nothing further to be done,

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7 Browne, Statute of Frauds (2nd edition), p. 2.

8 Browne, Statute of Frauds (2nd edition), p. 116.

9 Lobdell vs. Mason (1894), 71 Miss. 937, 15 So. 44. "Our statute of frauds does not contain the first and third sections of the English act of 29 Car. II. * * *; it is framed after the fourth section of the English act." However, the effect of the first and third sections has been accomplished by section 2763, Code of 1906 (section 2422, Hem. Code of 1927) and section 200, Code of 1906 (section 3096, Hem. Code of 1927).

except possibly the payment of consideration by the purchaser, and the contract in the form of a deed or other similar instrument is completely and fully executed so far as the title to the property is concerned as soon as it is made and delivered. Therefore, the only person who must have signed is the former owner in order that he may be protected against losing the title to his property by false and fraudulent statements. The new owner already has title by the acceptance of the deed, and will subsequently receive the same protection of the statute of frauds against losing his newly acquired title. Whereas, to the contrary, in the case of executory contracts for the sale of land, the title is to pass in the future and it is just as important that a purchaser should not have the title to property which he did not bargain for thrust upon him as that the owner of the property should be protected against having the title to his property taken from him when he did not so agree. Therefore, the fourth section gives protection to both parties by requiring the signing by that one of them who is to be charged in the litigation.

This view is well stated by one of the text writers:[10] "Contract *or* sale, the expression used in the clause under consideration, clearly means contracts *for* sale. But it is not only contracts for the *sale* of land which are intended to be embraced; for all the cases show that a *purchase* of land is as much within the statute as a sale of it, the policy of the law being not only to protect owners of land from being deprived of it without written evidence, but also to prevent a purchase of land from being forced by perjury and fraud upon one who never contracted for it."

Also, the words "party to be charged" are used in the fourth section as applying equally to several other forms of contract in addition to contracts for the sale of lands. The words must have the same meaning for the entire section. If the party to be charged is not the defendant, in the case of a contract "not to be performed within the space of one year,"[11] then who is he? For neither party is necessarily agreeing to make a transfer of anything, and neither is necessarily obligated in any different or higher degree than the other.

The author of this article has been unable to find a case from the English courts directly holding that specific performance cannot be had of the vendee unless he has signed

10 Browne, Statute of Frauds (2nd edition), section 263.
11 Fifteen months, in Mississippi.

a written agreement. However, this construction of the statute by the English courts is settled by cases involving the point in a collateral way. The courts of Kentucky and Tennessee, in which states the minority rule is in force that the party to be charged is the vendor and that a vendee who has not signed a written contract can be held upon proof of his oral agreement to purchase, have as a necessary result of this holding committed themselves to the view that a contract signed by the vendee cannot be enforced against him by a vendor who has not himself signed the contract.[12] This result is entirely logical upon the interpretation placed on the words "party to be charged" by those courts. The English courts have had exactly the same proposition presented under the fourth section, and they have held that a contract for the sale of land will be enforced against a vendee who has signed the agreement where suit is brought against him by the vendor who has not signed, the reason being that the party to be charged is the defendant in the suit, and it makes no difference whether the other party has signed or not.[13]

This holding of the English courts in applying the original statute upon which ours is directly modeled seems to settle the meaning of the Mississippi statute, because in adopting it our Legislature must be presumed to have intended to accomplish the same result as the parent statute.

It may be noted at this point that at one time it was thought that both parties must have signed, in order for the contract to be mutual in obligation and enforceable. But the courts have generally abandoned this view, and hold that if the other party has agreed in fact, the contract is mutual, even though one of the parties may have failed to obtain the writing which is required by the statute as evidence, and that when the complainant files his bill he furnishes a written memorandum if that is required.[14]

THE MISSISSIPPI CASES

The editorial writer previously mentioned cites two Mississippi decisions as indicating that the rule is that the vendor must always sign and that the purchaser's signa-

12 Murray vs. Crawford (1910), 138 Ky. 25, 127 S. W. 494, 28 L. R. A. (N. S.) 680; Lusky vs. Keiser (1914), 128 Tenn. 705, 164 S. W. 777, L. R. A. 1915C, 400.

13 Seton vs. Slade (1802), 7 Ves. Jun. 265, 32 Eng. Reprint 108; Laythoarp vs. Bryant (1836), 2 Bing (N. C.) 735, 132 Eng. Reprint 282. Both these decisions state the rule that the defendant is the party to be charged.

14 Note, 28 L. R. A. (N. S.) 680, 681 *et seq.* Also, Peevey vs. Haughton, *supra*, note 5.

ture is not necessary. The first of these is *Curtis vs. Blair.*[15] In that case an action was brought by the vendee against the vendor for specific performance of an alleged contract of sale. One of the defenses raised was the statute of frauds, it being argued that the letters written by the agent of the owner were mere propositions to sell the land. With reference to this phase of the case the court said: "It is true, that when the letters were written they were but propositions to sell. They contained, however, a description of the property and the terms on which it was proposed to be sold, and every requisite of certainty and identity without resort to other proof. It bound the party 'to be charged therewith,' by whom or in whose behalf it was made, according to its terms; and the moment it was accepted, and the terms complied with by the other party, if that were done, the transaction became mutual, as to all rights and liabilities resulting from it. The acceptance, if duly made, created the mutuality necessary to a complete contract." The writer then says of this language, "If by the last statement the court meant that the transaction became mutual in the sense that it could be enforced by the party who did sign, against the party who did not, it would seem to be true only upon the assumption that the statute requires the contract to be signed by the vendor, as such, rather than by the party sought to be charged."

The implication derived in the statement just quoted would seem to be to some extent justified by the actual language which the court used. However, this implication will not go far in showing the rule in this state, for the reason that it is purely *obiter.* Since the action was against the vendor, he must have signed the memorandum under either view of the meaning of the party to be charged, and it was unnecessary to decide what legal liability was imposed on the vendee, who was the complainant. Furthermore, all of this part of the case was immaterial, for the reason that the court held that the seller was not bound because the vendee had failed to accept the proposition to sell within the time limit stated in the offer.

The next case mentioned as indicating Mississippi's adherence to the minority view is *Johnson vs. Brook.*[16] This was an action against the vendors, husband and wife, upon an oral agreement for the sale of their several interests in certain lands. The husband had signed a deed conveying

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15 *Supra,* note 5.
16 *Supra,* note 5.

his interest but the wife refused to do so. The deed executed by the husband was not delivered. The complainant sought a specific performance against both vendors on the ground that the deed was a memorandum of the contract. But the court held that the complainant was not entitled to relief.

The editorial writer points out that the decision seems to be based on the ground of lack of delivery of the deed, and says, "there is no suggestion that the fact that the vendee did not sign would in itself have been fatal, although it would seem that objection in itself would be fatal except upon the assumption that it is the vendor, and not the party against whom the contract is sought to be enforced, who must sign." This statement is apparently based on the mistaken idea that the vendee was the defendant in the suit, because as a matter of fact in the course of the opinion the court stated that, "the vendor filed his bill in chancery for a specific performance." However, a careful examination of the reported decision shows that the vendee was actually the complainant. The court held that the deed signed by the husband was not a sufficient memorandum, because it was not delivered and because, being a conveyance of the husband's interest only, it did not set forth the entire contract, which was for the conveyance of the interest of the husband and the wife. Hence, this was a simple case under the statute of frauds, and the court was merely considering the question whether the party to be charged, who in this instance was the seller, had signed the contract or memorandum.

It has been argued that the case of *Washington vs. Soria,*[17] which enforces a rule laid down in earlier cases, shows that in this state the vendor is the party to be charged. In that case it was held that the grantee who has received a deed to land reciting the consideration, although the deed is not signed by him, can be required to pay the purchase price in a proper action. The holding is upon the ground that the contract has been fully performed by the grantor and nothing remains but the payment of the consideration. However, this case and other similar cases are not authority on the proposition under discussion, because in these cases we have a present transfer of title, as opposed to a contract for the sale of land, and, therefore, the fourth section of the statute of frauds, and our statute modeled upon it, have no application. Where the legal title has actually passed and been accepted by the purchaser or

17 (1896), 73 Miss. 665, 19 So. 485, 55 Am. St. Rep. 555.

grantee, the case falls within the statutes modeled after the English first and second sections, and, therefore, it is not the party to be charged who must sign, but the party who is disposing of the title.

Of the cases which place Mississippi in line with the great weight of authority, only that of *Peevey vs. Haughton*[18] is cited by the writer referred to. In this case it was held that a written agreement for the sale of land is enforceable against the vendor who signed it, although not signed by the purchaser, upon the offer of the latter to pay the consideration named. The principal argument for the defendant was that, since the vendee had not signed, the contract was not enforceable against him, and therefore lacked mutuality. In disposing of the case the court stated that it had carefully examined the cases cited by the defendant, and distinguished them by saying that in all of them "the action is against the party who had not signed." This language shows that the court had in mind that the party who must sign under the statute is the defendant.

On suggestion of error it was argued again that there was no mutuality and that the complainant's bill filed could not constitute a sufficient memorandum under the statute to make the contract mutual and enforceable. The court overruled the suggestion of error and held that the filing of the complainant's bill did make the contract mutual in remedy. In the course of a discussion of the question of mutuality, the court quoted language from a case from another state which seems to indicate clearly that it was understood that the party to be charged is the defendant. The quotation referred to is as follows:[19] "Where the party files a bill, he does an act that will bind him, and from that time there is mutuality; and the other party cannot plead the statute of frauds, because the words of that statute only prevent an action from being brought when the agreement is not signed by the party to be charged. When the bill is filed, it is an attempt to charge the defendant; and, if he has signed the agreement, it is signed by the party to be charged, and it follows that he cannot take advantage of the statute."

In the case of *Atkinson vs. Whitney*[20] a suit was brought to enjoin a sale under a deed of trust on the ground that the creditor had signed an agreement that if the debt should

18 *Supra*, note 5.

19 Ivory vs. Murphy (1865), 36 Mo. 534, 542.

20 (1890) 67 Miss. 655, 7 So. 644. This case was cited and followed in Peevey vs. Haughton, *supra*.

not be paid appraisers would fix the value of the land and he would buy it in, paying the difference between the value and the amount of the debt. He had signed this agreement but the debtor had not. The defense was that, the debtor (the owner of the land) not having signed, the contract was unenforceable against him, and hence not enforceable against the creditor. The court denied the defense offered, and granted the injunction. In the opinion, the court used the following language: "This was, in effect, a contract by which appellant agreed, in a certain event, to take appellee's lands at a price to be fixed by appraisers. The event having happened, the appraised value of the lands having been fixed, and the appellees now tendering their deed to the property in accordance with the contract, we are of opinion that the contract is enforceable against the appellant, the person who signed the written agreement, and the person sought to be charged in this suit."

Another Mississippi case seems very clearly to show what the rule is. In *Marqueze vs. Caldwell*,[21] Caldwell had agreed to purchase certain lands from Marqueze, who held them as trustee. The agreement was signed by Caldwell but not by Marqueze. Suit for specific performance was brought by the vendor against the purchaser, and a demurrer to the bill of complaint was overruled. The defendant relied on the claim that there was no mutuality in the obligation since the complainant had not signed the agreement, and, therefore, that it ought not to be enforced against him. In upholding the right of the complainant to recover, the court compared the English and Mississippi statutes, and reviewed the authorities. The court used the following language in the opinion: "We are of opinion that this suit for performance can be maintained against Caldwell, although Marqueze, the trustee, did not sign the agreement. The signature of the defendant sought in the suit to be charged, meets the words of the statute, and that interpretation is sustained by a force and continuous current of authority in England and in this country, which ought to and does put the question to rest."

The language quoted indicates clearly that the party to be charged is the defendant in the particular litigation. Furthermore, when the court decided that the vendee could be held to the contract when the vendor had not signed, it seems to be necessarily included in this holding that the

21 (1873), 48 Miss. 23. This case was cited and followed in Peevey vs. Haughton, *supra*.

vendor is not the party to be charged. For if he were, it would be necessary for him to sign in all cases under the statute.

CONCLUSION

On reason and principle the great weight of authority appears to be sound doctrine. Even in the absence of decided cases in this jurisdiction, it is believed that the Mississippi court would give the same interpretation to the statute. But, in view of the Mississippi decisions which have been reviewed, there can hardly be any doubt that the majority rule applies here, and that the important question always is whether the defendant in the particular suit has signed the agreement.

It has been argued, with some force, that the rule enforced in *Washington vs. Soria*[22] applies to the case of a contract for the sale of land, if the vendor has fully performed by tendering a deed in accordance with the agreement. If the question were not a statutory one, this argument might be sound. The rule in that case is correct on the facts, because the contract involved is a deed of conveyance, a present transfer of legal title; the fourth section of the statute of frauds does not apply, and the only requirement is a signing by the grantor. The grantee's parol promise to pay the consideration is not controlled by the statute. But, in the case considered in this article, we have a contract for the sale of land, title to pass in the future, and therefore the fourth section of the statute prevents the rule in the Soria case from being followed. And our court has held that exceptions cannot be engrafted on the statute of frauds.

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22 *Supra*, note 17.

SOME ASPECTS OF THE COMMERCE CLAUSE

By R. V. Fletcher*

The Commerce Clause of the Constitution of the United States, about which there has been so much controversy and which has been the subject of so much decision, is contained in two lines (Paragraph Third, Section 8, Article I) and reads as follows:

"To regulate commerce with foreign nations, and among the several states, and with the Indian tribes."

It is characteristic of our fundamental law that the rights conferred upon the federal government are stated in the briefest language and in such general terms as to permit the application of the constitution to all the changing conditions which have occurred in the one hundred and forty odd years of our national life. The federal constitution differs in this respect from some modern state constitutions which consist, unhappily, of a body of statutes defining the rights and duties of the citizens in great detail.

It is well understood by all students of our political history that conflicts among the states with reference to trade and commerce constitute the principal incentive for the creation of the federal government framed along lines which would preserve the independence of the states in purely local matters and delegate to the federal government the management and control of all such problems as are essentially national in their scope. It was obvious to the founders of our government that conflicts should not be permitted to exist among the states as to trade and commerce, since such conflicts would inevitably lead to dismemberment of the Union and the destruction of anything like a well ordered national existence. Prior to the adoption of the constitution each state was free to prohibit the importation and exportation of goods from and to other states, interstate tariff barriers were possible, and by reason of these hampering regulations it was well said that we were a nation one day and thirteen nations another.

When the federal constitution was adopted at Philadelphia in 1787, and subsequently ratified by the several states, there was no more important purpose to be sub-

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served than to establish a system under which commerce among the states should be absolutely free, so that every part of the United States would be unrestricted in its commercial intercourse with every other part of the country. This desirable end was accomplished by adopting the so-called Commerce Clause, which gave to the Congress power to regulate commerce among the states, thereby bringing about that uniformity of regulation which everyone considered desirable.

Very early in the development of our nation the vital question arose as to whether a state was free to regulate interstate commerce in the absence of any exertion of the power by the federal government. It was argued with force and earnestness by those who were disposed to be jealous of the rights of the states that while the constitution gives Congress the right to regulate commerce, yet until Congress sees proper to enter the field of regulation and enacts a specific statute on the subject the states were free to enact restrictive measures which could only be set aside by the exertion of power on the part of Congress. This question as to whether the powers of the federal government and the powers of the state were concurrent, or whether the power of the federal government was exclusive, arose in 1824 and was settled in the great leading case of *Gibbons vs. Ogden,* 9th Wheaton 1, a case with which the profession is intimately familiar, which was argued at the bar of the Supreme Court by Daniel Webster and other lawyers of almost equal fame, and was decided on March 2, 1824, by Chief Justice Marshall. In that decision, which is one of the landmarks of our constitutional history and which takes rank with such other great decisions of the Chief Justice as *Marbury vs. Madison, The Dartmouth College Case, Fletcher vs. Peck,* and *McCulloch vs. Maryland,* Marshall laid down the rule that the power of Congress over interstate commerce was exclusive and that a statute of New York giving to certain named individuals the exclusive right to navigate on all the waters within the jurisdiction of the State of New York was repugnant to the Commerce Clause and, therefore, unconstitutional. In that great decision occur many of the phrases which have become classics in the law relating to commerce, such as: "Commerce, undoubtedly, is traffic, but it is something more: it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carry-

ing on that intercourse." Again: "Commerce among states, can not stop at the external boundary line of each state, but may be introduced into the interior." Or again: "Comprehensive as the word 'among' is, it may very properly be restricted to that commerce which concerns more states than one. The phrase is not one which would probably have been selected to indicate the completely interior traffic of a state, because it is not an apt phrase for that purpose." Or again: "The power of Congress, then, whatever it may be, must be exercised within the territorial jurisdiction of the several states." Or again: "When a state proceeds to regulate commerce with foreign nations, or among the several states, it is exercising the very power that is granted to Congress, and is doing the very thing which Congress is authorized to do."

It was not held in *Gibbons vs. Ogden* that purely internal commerce of the state could be regulated by Congress or that the states were prohibited from enacting wholesome regulations with reference to commerce which was purely local to their boundaries. On the other hand, it was clearly held that in the field of interstate commerce the federal government is supreme and that the states may not enact regulations which would have a direct and immediate effect upon interstate commerce. We shall see how this principle has been applied to the complex commercial affairs of our modern life.

For a long time after the decision in *Gibbons vs. Ogden* there was no occasion to challenge its validity and no opportunity to apply it in any important respect. *Gibbons vs. Ogden* was a navigation case and for a long time our chief concern, so far as agencies of transportation are concerned, was with the operation of boats and ships upon our foreign and domestic waters. However, in the course of time, with the development of our railroad systems and the consequent decline of our internal commerce on the water, both state and federal governments began to be concerned with the extent to which the agencies of commerce could be regulated by the federal government as contradistinguished from the state government. Some time after the Civil War, or beginning about 1870, the states, feeling the need of adequate regulation of railroads and in the absence of any comprehensive system of regulation adopted by Congress, began to create railroad commissions and to enact statutes dealing with railroad rates and railroad practices. In many cases laws were passed by the

several states fixing the amount which the railroads could charge for freight and passenger transportation within the borders of each state. The power of the states in this respect was tremendously increased, for a time at least, by the decision of the Supreme Court of the United States in *Munn vs. Illinois,* 94 U. S. 113. That was not a railroad case but it did involve a public utility and the decision turned upon the proper construction of the Commerce Clause. It was held in the *Munn* case that the questions submitted to the court were essentially legislative in their character and that a state had the right to enact regulatory measures governing warehouses, which regulations might take the form of prescribing the rates which should be charged for warehouse service, duties of railroad companies in delivering and receiving grain, and other matters which apparently had direct connection with commerce. It was held that if injustice had been done to private property the remedy must be sought in legislation rather than in the courts; that it was within the police power of the state to regulate the warehousing of grain, and that since Congress had not acted in the premises there was no room for the application of the Commerce Clause. This language is significant:

"We know that this is a power which may be abused; but that is no argument against its existence. For protection against abuses by legislatures the people must resort to the polls, not to the courts."

The general principles which underlay the *Munn* case were applied by the Supreme Court in *Peik vs. Chicago and North Western Railway Company,* 94 U. S. 164. In that case it appeared that the Wisconsin Legislature passed a law relating to the amount which should be charged for passenger and freight transportation within the State of Wisconsin. The law applied not only to persons and property carried within the state but as well to persons and property taken up outside the state and brought within it, or taken up inside and carried without. The court held that in the absence of regulation by Congress it was within the competency of the Wisconsin Legislature, despite the Commerce Clause, to prescribe the rates of fare which should be charged within the State of Wisconsin, even though the shipments and the journeys might be interstate. The principles laid down in *Munn vs. Illinois, supra,* and in *Chicago, Burlington & Quincy Railroad Company vs. Iowa,* 94 U. S. 155, were relied upon to uphold the authority of the state in the premises. Encouraged by decisions of

this character, the several states entered upon an era of intense regulation which was applicable not only to purely internal commerce but to interstate commerce as well, insofar as that commerce was carried on within the limits of the state prescribing the regulations. Inasmuch as all commercial activity must be carried on within the borders of some particular state, as Chief Justice Marshall pointed out in *Gibbons vs. Ogden,* the tendency was to subject all commerce to regulation at the hands of the state insofar as that regulation consisted in fixing rates and prescribing conditions under which the commerce should move. It was at once obvious that a state of affairs confronted the country which would be conducive to the utmost confusion. In other words, a traveler making a journey from New York to San Francisco would be called upon to pay different rates of fare in each state through which he traveled and the through charge from the Atlantic seaboard to the Pacific seaboard would be made up of the sum of the several rates prevailing in each particular state. This state of affairs would inevitably lead to a condition where interstate commerce was being regulated by the states, contrary to the principles which underlay *Gibbons vs. Ogden* and contrary to the theory of the founders of the government.

This rather chaotic condition of affairs was sharply checked by the decision of Justice Miller in the case of *Wabash, St. Louis & Pacific Railway Company vs. Illinois,* 118 U. S. 557. That case was decided in 1886. It appears that the State of Illinois passed a law providing that within the state no railroad can charge or receive for transporting passengers or freight a greater sum for a less distance than it charges for a longer distance. The Wabash Railroad transported goods from Peoria to New York City and charged less therefor than it charged from Gilman to New York City, Gilman being eighty-six miles nearer to New York than Peoria, the difference in distance all lying within the State of Illinois. The Supreme Court of Illinois subjected the Wabash Railway to penalties by reason of making charges of this character and the case came on to be reviewed in the Supreme Court of the United States. That body, speaking through Justice Miller as its organ, and with the Chief Justice and two Associate Justices dissenting, held that since the movement of freight between Gilman and Peoria to New York was interstate commerce it was beyond the power of the state government to enforce penalties with reference to the charges for this character of

transportation. The court held that even as to so much of the journey as was within the State of Illinois such business was commerce among the states and the states could not legislate with reference thereto, even in the absence of congressional legislation. While the court did not expressly overrule the Munn, Peik and Iowa cases, yet they were severely limited in their application to their own particular facts. The court recurred to the underlying principles in *Gibbons vs. Ogden* and held that interstate commerce could not be regulated by the states in this indirect way. This language is worthy of reproduction as defining accurately the true rule on the subject:

"As restricted to a transportation which begins and ends within the limits of a state it may be very just and equitable, and it certainly is the province of the state legislature to determine that question. But when it is attempted to apply to transportation through an entire series of states a principle of this kind, and each one of the states shall attempt to establish its own rates of transportation, its own methods to prevent discrimination in rates, or to permit it, the deleterious influence upon the freedom of commerce among the states and upon the transit of goods through those states can not be overestimated."

Since the decision in the Wabash case it has not been seriously contended in any reputable national court that the states have any power whatever, either direct or indirect, over the regulation of interstate rates.

In view of the fact that approximately eighty percent of the commerce of the country was interstate, it was obvious after the decision of the Wabash case if there was to be any effective regulation of the commerce of the country the federal government would have to interpose the authority conferred upon it by the Constitution. To this end there was enacted in February, 1887, the first Act to Regulate Commerce, marking the initial entry of the national government into the field of railroad regulation. It is not my purpose to analyze the first Interstate Commerce Act nor to follow the changes which have been made from time to time, all of which changes have increased the power of the federal administrative agency in the field of regulation of railroad rates and practices. Suffice it to say that in the original act and in all subsequent revisions Congress has been careful to provide that the act should not apply "to the transportation of passengers or property, or receiving, delivering, storage, or handling of property, wholly within one state and not shipped to or from a foreign country from or to any place in the United States." This

provision of the act does little more than to assert the limitations imposed by the constitution upon the power of Congress. Even if Congress had undertaken to regulate commerce wholly within the state it is reasonably clear that such action would have been beyond the power of Congress under the Constitution. To this effect is *Employers Liability Cases,* 207 U. S. 463, in which the Supreme Court of the United States struck down as unconstitutional the first Employers Liability Act upon the ground that the language employed was so broad as to make it applicable not merely to the interstate features of transportation but to the intrastate features as well. The defect in the first Employers Liability Act was remedied in the second act, which was upheld in *Second Employers Liability Cases,* 223 U. S. 1.

While Congress did not undertake in the act to regulate commerce to interfere with commerce which was purely intrastate, it did provide that there should be no discrimination against any person or locality or any particular description of traffic in the field of interstate commerce. This section of the law ultimately gave rise to a line of decisions in which state rates were set aside by the Interstate Commerce Commission with the sanction of the Supreme Court of the United States on the ground that where state rates were found to be of such a character as to operate prejudicially against persons and localities engaged in interstate commerce the state rates must yield to the superior authority of Congress. The question first arose in the *Minnesota Rate Case,* 230 U. S. 352. In that case the carriers contended, among other things, that the State of Minnesota had by legislation adopted a line of intrastate rates which were lower than interstate rates operating in the same territory over which the state concededly had no authority. The Supreme Court of the United States upheld the state rates as against the contention that they constituted a discrimination against interstate commerce on the ground that there was no authority except the Interstate Commerce Commission which could determine the question as to whether a particular rate or a particular line of rates actually resulted in prejudice and injury to persons and localities engaged in interstate commerce. The decision in the Minnesota Rate Case followed the general line of previously announced authorities that in matters committed to the administrative judgment and discretion of the Interstate Commerce Commission the courts can not act in the absence of a finding by the Com-

mission on the subject, *Texas & Pacific Railway Company vs. Abilene Cotton Oil Company,* 204 U. S. 426. The question which the court found it unnecessary to decide in the Minnesota Rate Case was sharply presented for decision in the case of *Houston, East and West Texas Railway Company, et al, vs. United States,* 234 U. S. 342. Shreveport, Louisiana, is located near the Texas line and was a jobbing center of some importance. Its wholesale dealers sold a considerable quantity of goods in the nearby State of Texas and, of course, shipments from Shreveport to these Texas points were interstate and beyond the control of any state commission. In the territory lying west of Shreveport that city came into competition with important Texas shipping centers like Dallas and others who shipped into the same territory over the same lines of railroad and under operating and traffic conditions which were quite similar to those which controlled the movement from Shreveport to intermediate territory. The Texas Railroad Commission reduced the rates from Texas shipping points to Texas consuming territory between Dallas and Shreveport to such a degree as to make it thereafter difficult, if not impossible, for the Shreveport jobbers to compete in the State of Texas. Thereupon, a complaint was filed before the Interstate Commerce Commission by commercial interests of Shreveport seeking to have the Interstate Commerce Commission condemn as unlawful and discriminatory against interstate commerce these rates established by the Texas Commission. It was argued that the Texas Commission had not undertaken to fix any interstate rates but had done no more than to fix rates wholly within the State of Texas. The Supreme Court of the United States held, however, that the action of the Texas Commission, having been held by the Interstate Commerce Commission to be discriminatory against interstate commerce, was unlawful, and the court upheld the Commission in setting aside these Texas rates. This was the first instance where the right of the state to regulate its own commerce was denied. The denial was based not upon any assertion that the federal government could interfere with intrastate rates as such, but upon the view that the unquestioned supremacy of the federal government in the field of interstate commerce gave it the right to strike down state rates if as a result of state action there should be a discrimination against persons and localities engaged in interstate commerce.

So the law stood at the time of the enactment of the Transportation Act in 1920, upon the return of the rail-

roads to their owners at the conclusion of the period of federal control. In order to foster and encourage the development of the commerce of the country Congress made many important changes in the Interstate Commerce Act. We are not concerned with these changes here except as they may deal with the question of the power of the states in the field of commerce. It was provided by Section 13 of the Interstate Commerce Act, as amended by the Transportation Act in 1920, that whenever the Interstate Commerce Commission, after investigation, found that any rate classification or practice would result in undue or unreasonable advantage, preference or prejudice as between persons or localities in intrastate commerce on the one hand and interstate commerce on the other hand, or any undue, unreasonable or unjust discrimination against interstate commerce, then the Interstate Commerce Commission shall have power to fix such rate, regulation or practice as would remove the discrimination. The effect of this provision of the new law was to strengthen the power of the federal government in a field which had theretofore been given over largely to the authority of the states.

In considering the effect of Section 13, it should be mentioned that by another provision of the Transportation Act the Interstate Commerce Commission was required to fix a body of rates throughout the United States which would yield sufficient revenue to the railroads to maintain their properties and pay a fair return upon the value of the property. It was clear from the general provisions of this Section (15-a) that intrastate rates could not be ignored and that the Commission would have a certain amount of authority over intrastate rates in the matter of placing them upon a basis which would yield to the railroads sufficient revenues to pay a fair return upon the value of the property. Shortly after the enactment of the Transportation Act of 1920, the Interstate Commerce Commission, in obedience to the mandate of Section 15-a of the act, to which we have referred, authorized an increase in the freight rates varying from twenty-five to thirty-five percent, and authorized further an increase in passenger rates to a uniform basis of 3.6c per mile throughout the country. Interstate rates having been increased accordingly, it was at once apparent that a discrepancy of a serious nature existed between the new advanced interstate rates and intrastate rates in many states which had been fixed by the orders of regulating commissions and by the statutes of various states. As an illustration, in the State of Wisconsin there

was a state statute which fixed intrastate passenger rates at 2c per mile. It was at once apparent that numerous discriminations and discrepancies must exist if all interstate rates within the state of Wisconsin were fixed at 3.6c per mile and intrastate rates remained at 2c per mile. The effect would be that travelers would purchase transportation within the borders of the state at 2c per mile and then at some intermediate point of the journey purchase other tickets for interstate transportation at 3.6c per mile. Innumerable instances of this practice sprang up all over the country. The carriers presented to the Interstate Commerce Commission petitions seeking to have the Commission declare that these intrastate rates on a basis substantially lower than corresponding interstate rates amounted to a discrimination against interstate commerce within the meaning of Section 13 of the amended Interstate Commerce Act. Ultimately there came to be decided by the Supreme Court of the United States a passenger case involving the validity of the Wisconsin law and the action of the Interstate Commerce Commission in condemning it. The case is reported under the name and style of *Railroad Commission of Wisconsin vs. Chicago, Burlington & Quincy Railroad Company,* 257 U. S. 563. In that case the Supreme Court held that the state rates would have to give way and that by reason of two considerations. In the first place the court held that it would be a discrimination against numerous persons and localities engaged in interstate commerce to allow the 2c state rate to exist side by side with the 3.6c interstate rate. It was held further, however, that since it was the duty of the Interstate Commerce Commission to fix rates which would yield a fair return upon the value of the property, the lower state rates amounted to such a revenue discrimination against the carriers as would prevent the Interstate Commerce Commission from carrying out the mandate of the statute without at the same time unduly burdening interstate commerce. The comprehensive reasoning of the court was directed to the point that the railroads of the country were placed under the fostering care of the Interstate Commerce Commission, that it was the duty of the Commission to provide rates which would enable the railroads to operate as efficient agencies of Congress for the general good, and that no state should be permitted to fix its own rates upon a basis so low as to deprive a railroad of needed revenue and thereby impose upon the interstate body the duty of raising interstate rates

to an otherwise unreasonably high level to the manifest detriment of persons engaged in interstate commerce.

Since this decision in the Wisconsin case it has been generally recognized that the Interstate Commerce Commission has authority to condemn any body of state rates which are substantially lower than interstate rates applying on the same commodity and under the same circumstances.

It must not be thought, however, that in the absence of a finding of discrimination by the Interstate Commerce Commission state rates may be condemned or enjoined by the federal courts. In a very recent case *(Board of Railroad Commissioners of North Dakota, et al, vs. Great Northern Railway Company, et al,* 281 U. S. 412) the Supreme Court of the United States held that a federal court has no authority to enjoin the enforcement of a state order reducing intrastate rates pending a determination by the Interstate Commerce Commission of the question whether these state rates cause undue discrimination against interstate commerce. In that decision the court holds that where the state commission makes an order as to intrastate rates it is presumably valid and presumably within the authority of the state commission and that the only body which can declare a violation of interstate commerce is the Interstate Commerce Commission, and, further, that the rates must be put into effect and continued until the Interstate Commerce Commission rules on the matter.

There has been another interesting development of the Commerce Clause in a field somewhat removed from the regulation of rates and practices. Congress has never seen proper to pass a general federal incorporation act even in the case of railroads or other transportation companies. A few railroads, such as the Texas & Pacific and the original Union Pacific, were chartered by Congress, but this is the exception rather than the rule. Ordinarily, railroads must look to the states of their creation for their authority to exercise corporate functions. The question has arisen whether the Commerce Clause of the constitution would authorize Congress to grant powers to a state corporation which were in excess of the authority granted by the states themselves in the charter. At first blush it would seem that since a railroad company takes its charter from the state, since it derives its very life from the state, it would be the exclusive province of the state to place

limitations upon the corporate activities of its creature. And yet it has been held by the Supreme Court of the United States that if the exigencies of interstate commerce so require, Congress may grant authority to a state corporation to do acts which are beyond the scope of its original charter. Such a case is *California vs. Central Pacific Railroad Company,* 127 U. S. 1. In that case it appeared that the Central Pacific Railroad Company was a California corporation and naturally had no power under its charter to build a railroad beyond the confines of the state. Congress, however, conferred power upon this California corporation to extend its line beyond the limits of the state so that it might unite itself with the line of the Union Pacific which was being built westward from Omaha. In passing upon the validity of such a position Mr. Justice Bradley holds that it could not be doubted that Congress under the power to regulate commerce could pass a law thus extending and enlarging the power of this state corporation beyond anything which the state had granted or could grant in view of the fact that the state's jurisdiction is limited to its own confines.

Almost unlimited possibilities suggest themselves in considering how far the federal government may go in setting aside state-enacted restrictive statutes dealing with agencies of commerce. As an illustration, the Transportation Act provides that where the Interstate Commerce Commission has given permission to railroads to consolidate, all state and federal anti-trust laws are to be considered as swept aside. It is further provided that the only authority which a railroad company must seek in effecting a consolidation of its properties and franchises with another is the authority of the Interstate Commerce Commission, which, of course, is an agency of Congress. It is entirely possible that ultimately it will be held that when the Interstate Commerce Commission authorizes a consolidation the effect of such an order would be to endow a state corporation with power to do what is not allowed by its charter or, indeed, that which is absolutely prohibited by state law.

Some of the features of the Interstate Commerce Act have not yet been tested. As an illustration, it is provided in the law that the Interstate Commerce Commission has authority to require a railroad to extend its lines. We have seen that Congress might authorize a state railroad corporation to build lines beyond the limits of its charter. It

remains to be seen, however, whether the Supreme Court of the United States will uphold the right of an administrative body to require a railroad company to extend its line into a territory not permitted under the charter which it has received from the state.

On the whole, it would seem to be fairly clear that whatever control the states now have over their rates is so limited and restricted as to be shadowy rather than substantial.

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NOTE AND COMMENT

THE UNIVERSITY OF MISSISSIPPI LAW SCHOOL.—This session the "Ole Miss" Law School is utilizing its commodious new law building for the first time. The building is named in honor of Lucius Quintus Cincinattus Lamar, one of Mississippi's most brilliant lawyers, jurists, and statesmen, who served as Dean of the school from 1866 to 1870.

By act of the Legislature in 1928, $150,000.00 was appropriated for the erection of the building, which is one of the most complete in the South. The basement floor contains two large typewriting rooms, a well furnished lounge room, the Mississippi Law Journal office, locker room, and a meeting room for the various law societies. The first floor contains two class rooms, a large assembly room, and four offices. Over half of the entire second floor is a library reading room. This floor contains also a stack room for the books which are more widely used, two offices, and a well equipped court room. The balcony overhanging one end of the library is a stack room for those books which are not used often.

The present library contains approximately 8,500 volumes, and is being enlarged from time to time as additions are needed.

The session of 1930 sees three new faces added to the faculty of the school. Judge Stone Deavours, recently appointed Dean, is recognized as one of the ablest members of the Mississippi bar. He is a member of the class of '92, having received his LL.B. degree with special distinction. He served as Chancellor of the second judicial district from 1901 to 1905, when he retired from the bench to engage in the active practice of law. At the time of his appointment as Dean of the Law School he was a member of the firm of Deavours & Hilburn, of Laurel, Mississippi, and enjoyed a large and lucrative practice.

Another new member of the faculty is Mr. R. F. Payne. Mr. Payne received his B.S. from the University of West Virginia in 1921, and his LL.B. from Yale in 1926. He was admitted to the West Virginia bar in 1926, but retired from active practice in 1927 to accept a position as instructor in law at the University of Tennessee. He remained at Tennessee during 1927 and 1928, and then resigned to accept a position as associate professor of law at the University of Kansas. He remained at the University of Kansas until this year, when he was elected to a full professorship of law at the University of Mississippi.

The third of the new members of the law faculty is Mr. J. J. Smith. Mr. Smith received his A.B. degree from the University of Alabama in 1927, making a brilliant record at that institution. He received his LL.B. degree from the Harvard Law School in 1930. He is a member of Phi Beta Kappa.

Of the old members of the faculty only Judge T. C. Kimbrough remains. Judge Kimbrough was elected to a chair in the law school in 1920, and gave up a highly successful career as a lawyer to accept this position. It was under his splendid leadership and direction that a three year law course was arranged

at "Ole Miss" and the school was given an "A" grade rating by the American Association of Law Schools. It was also due largely to his untiring efforts that the bar of Mississippi was awakened to the need for a new law building and better physical equipment for the law school. Judge Kimbrough holds an A.B. degree from the University of Mississippi, and an LL.B. degree from Millsaps College.

The enrollment of the law school for the session of 1930-1931 is 105, the largest in its history. With its adequate physical equipment and strong faculty it makes its bid for a place among the best law schools in the South.

W. CALVIN WELLS, JR.

CORPORATE CONTROL THROUGH HOLDING COMPANIES.—In this age of prolific industrial development, the tendency of "big business" points definitely toward centralization of control. The influence and importance that corporations enjoy are increasing. There has been, and still exists, an inevitable tendency toward the consolidation of powerful corporations. In the United States, some of the states have recognized this fact and have followed the English practice in prescribing rules of regulation rather than rules of prohibition.

The holding company, organized to purchase and hold the stock of other corporations, is of comparatively recent origin. The same result is brought about by them that was formerly effected by actual consolidation of various corporations.

An exceptionally good definition is found in Bouvier's Law Dictionary, Rawles' Third Revision, Vol. 2, page 1445, in which it is stated that a holding company is "a corporation organized to hold the stock of another or other corporations. Such companies become legally possible by virtue of the legislation which is said to exist in nearly all the states, which authorizes a corporation to hold and own the capital stock of other corporations."

It is necessary for legislative authority in most states to be granted to one corporation to hold stock in another. The rule supported by the great weight of authority is that a corporation can not take and hold the stock in another corporation unless such power has been expressly granted to it in its charter or conferred by necessary implication. See: *Franklin Co. vs. Lewiston Savings Inst.*, 68 Me. 43; *Holmes etc. Mfg. Co. vs. Holmes etc. Metal Co.*, 127 N. Y. 252. "By some authorities, however, an express grant of power is held to be necessary where the holding is intended to be permanent, while by other authorities an express grant is specifically held to be unnecessary." 14 Corpus Juris 284.

RELATION TO THE MINORITY HOLDERS

When a holding company controls a corporation through stock ownership, the rights of the minority holders must be considered. In 5 Thompson on Corporations, Section 4066, it is said: "The legislature has the power to authorize a corporation to acquire the permanent ownership of stock in another corporation and to issue its own stock therefor, but the control of the latter corporation must not be in fraud of the rights of its minority stockholders or be so exercised as to prevent the corporation from performing the public duties imposed by its charter."

The familiar principle of law that the owner of the majority of the stock of a corporation is under certain legal obligations toward the minority stock-

holders is applicable. This obligation does not go to the extent of a trusteeship except under unusual circumstances.

Any acts of the corporation which are for the benefit of the majority stockholders to the detriment of the minority stockholders will be scrutinized carefully in a court of equity at the instance of the minority stockholders and will be set aside where actual fraud is involved. See 5 Thomp. Corp., Sec. 4064.

In a case where a majority of the stock was owned by a corporation or a combination of individuals, which assumed the control of another company's business and affairs through its control of the officers and directors of the corporation, it was held that, for all practical purposes, it became the corporation of which it held a majority of stock and assumed the same trust relation toward the minority stockholders that a corporation itself usually bears to them. *Farmers' Loan & Trust Co. vs. N. Y. & N. Ey. Co.*, 44 N. E. 1043. Seemingly, no distinction is made by the courts in the relation of the majority holder to the minority holders because the majority stockholder is a corporation rather than a group of individuals.

WHEN THE CORPORATE VEIL WILL BE PIERCED

In *Martin vs. Development Co. of America*, 240 Fed. 42, the court said: "A holding corporation has a separate corporate existence, and is to be treated as a separate entity, unless facts are averred which show that such separate corporate existence is a mere sham, or has been used as an instrument for concealing the truth, or where the organization and control are shown to be such as that it is but an instrumentality or adjunct of another corporation. *Pittsburg & Buffalo Co. vs. Duncan et al*, 232 Fed. 584; in re: Watertown Paper Co., 169 Federal 252." See also 5 Thomp. Corp., Sec. 4098.

The law governing the status of a corporation which controls another through ownership of shares of stock is very clearly laid down in *Industrial Research Corporation vs. General Motors Corporation et al*, 29 Fed. (2d) 623. The defendant, General Motors Corporation, owned the *majority* of the *voting* stock of the defendant, Yellow Truck and Coach Manufacturing Company, and controlled and directed its business. The Yellow Truck etc. Company owned substantially all the capital stock of the defendant, General Motors Truck Corporation, and controlled and directed its business. The General Motors Truck Corporation owned substantially all the stock of the defendant, General Motors Truck Company, and controlled and directed its business. The General Motors Truck Company had a regular place of business in Toledo. The plaintiff also averred that the defendant, General Motors Corporation, had maintained another place of business in Toledo, conducted as the Chevrolet Motor Ohio Company, a corporation organized and existing under the laws of Ohio. The capital stock of this corporation was all owned by the General Motors Corporation and its business directed by the latter.

The court held that the mere fact that the stockholders of two corporations are the same with one exercising control over the other through stock ownership, or through identical stockholders, does not per se make either the agent of the other. But, in the words of District Judge Killits, who rendered the opinion in the case under consideration, " . . . the fiction of the corporate entity may be disregarded, where one corporation is so organized and controlled

and its affairs are so conducted that it is, in fact, a mere instrumentality or adjunct of another corporation . . . (citing cases)

"It follows that . . . each case should be regarded as sui generis. . . .

"It is recognized that one corporation may be an agent for another corporation, and that by means of stock ownership one of such companies may be converted into a mere agent or instrumentality of the other. *United States vs. Delaware, etc. R. R. Co.*, 238 U. S. 516, 529, 35 Sup. Ct. 873."

STATE CONTROL

Some states do not allow corporations created under their laws to hold stock in other corporations. The District of Columbia has a statute that directly forbids the corporate ownership of the stock of other corporations. Section 620 of the D. C. Code, Ann., amended to June 7, 1924, provides:

"It shall not be lawful for any company to use any of their funds in the purchase of any stock in any other corporation."

There are other states that permit the creation of holding companies. Among these are New Jersey and Maine. It may be interesting to note their statutes in connection with this subject.

Chap. 195, Par. 3, of the Laws of New Jersey (1917) provides:

"Subject to the foregoing provisions of this Act: any corporation may purchase, hold, sell, assign, transfer, mortgage, pledge or otherwise dispose of the shares of the capital stock of, or any bonds, securities or evidences of indebtedness created by other corporation or corporations of this or any other state or any foreign country, and while owner of such stock may exercise all the rights, powers and privileges of ownership, including the right to vote thereon."

Prior to the enactment of the following statute, the courts in Maine had doubted the capacity of one corporation to hold stock in another. *Franklin Co. vs. Lewiston Inst. for Savings*, 68 Maine 43.

The General Corporation Statute of Maine, Chap. 51, Sec. 55 (revised 1916) provides: Corporations may purchase, hold, sell, assign, transfer, mortgage, pledge, or otherwise dispose of the shares of the capital stock of or any bonds, securities or evidences of indebtedness created by any other corporation or corporations of this or any other state, territory or country, and while owner of such stock may exercise all the rights, powers and privileges of ownership, including the right to vote thereon."

Heath, in his work on "Maine Corporations," at page 63, stated that this provision (referring to the statute above quoted) was enacted to remove any doubt that may have been created by the common law doctrine prevailing in many states that such power does not exist unless expressly conferred or necessarily implied by the charter.

But as some of the states do not authorize or permit corporations organized under their own laws to purchase or hold the shares of stock of other corporations, there is presented a very interesting question as to whether foreign holding companies possess the right to purchase the stock of domestic corporations within such states.

The laws of the State of Illinois do not permit, except for a limited purpose, the holding of stock by one corporation in another. *Converse vs. Emerson Co.*, 242 Ill. 619, 90 N. E. 269; *Converse vs. Gardner Co.*, 174 Fed. 30, 98 C. C. A. 16.

In *Central Life Securities Co. vs. Smith*, 236 Fed. 170 (C. C. A.), it was the opinion of the court that where a Maine corporation not only bought stock

in an Illinois corporation, but practically owned its entire stock, such being unlawful in Illinois, the purpose was not a lawful purpose in Maine and that it was only for the purpose of carrying on a lawful business that a corporation in Maine could be organized.

The Supreme Court of Illinois, in *Golden vs. Cervenka*, 116 N. E. 273 (1917), said:

"A domestic corporation is not authorized to hold stock in another corporation, and a foreign corporation can exercise no powers in this state which cannot be lawfully executed by a domestic corporation. *Dunbar vs. American Tel. & Tel. Co.*, 238 Ill. 456, 87 N. E. 521."

This same tribunal has also held that a syndicate which owned shares of stock of a domestic corporation remained the owners thereof, regardless of the fact that they formed a foreign corporation as a holding company of the stock, because a foreign corporation could not lawfully hold stock in a resident corporation. *Chicago Title etc. Co. vs. Central Trust Co.*, 144 N. E. 165. See also *U. S. Vacuum Sweeper Co. vs. Grath*, 210 Ill. App. 358; *Coler vs. Tacoma Ry. Co.*, 65 N. J. Eq. 347.

FEDERAL CONTROL

Even in those instances where the state legislature has sanctioned the holding by one corporation of stock in another, there yet remains to be considered the control that the Federal Government might exercise.

In the case of *Northern Securities Co. vs. United States*, 193 U. S. 197, Mr. Justice Harlan said:

"But even if the state allowed consolidation, it would not follow that the stockholders of two or more state railroad corporations, having competing lines and engaged in interstate commerce, could lawfully combine and form a distinct corporation to hold the stock of the constituent corporations, and, by destroying competition between them, in violation of the (Anti-trust) act of Congress restrain commerce among the states and with foreign nations."

Another important case on this subject is *United States vs. Reading Co.*, 253 U. S. 26, 40 Sup. Ct. 425. The following excerpts are from the opinion:

"This acquisition placed the Holding Company in a position of dominating control not only over two great competing interstate railroad carriers, but also over two great competing coal companies, engaged extensively in mining and selling anthracite coal, which must be transported over the controled interstate lines of railway.

"Again, and obviously, this dominating power was not obtained by normal expansion to meet the demands of a business growing as a result of superior and enterprising management, but by deliberate, calculated purchase for control.

"That such a power, so obtained, regardless of the use made of it, constitutes a menace to and an undue restraint upon interstate commerce, within the meaning of the Anti-trust Act, has been frequently held by this court." See also *United States vs. Union P. R. Co.*, 226 U. S. 61.

It will be noticed from the foregoing cases that Federal jurisdiction has been exercised only in those cases where interstate commerce was involved and where there has been alleged a breach of the Anti-trust Act.

FEDERAL LEGISLATION

As previously stated, the subject of holding companies is a vastly important one, growing and expanding daily. Such being true, it is probable that Congress will enact legislation specifically directed to the regulation, supervision, and control of holding companies. This seems especially likely when we con-

sider what might be termed the preliminary steps that have already taken place in Congress, relating to this subject.

Paragraph 1 of House Resolution 114, 71st Congress, 2d Session, which was considered and agreed to on January 24, 1930, resolved:

"That, for the purpose of obtaining information necessary as a basis for legislation, the Committee on Interstate and Foreign Commerce, as a whole or by subcommittee, is authorized to investigate the ownership and control, direct or indirect (through stock ownership or control or otherwise), of stock, securities, or capital interests in any common carrier engaged in the transportation of persons or property in interstate commerce, by holding companies, investment trusts, individuals, partnerships, corporations, associations, and trusts, and the organization, financing, development, management, operation, and control of such holding companies, investment trusts, partnerships, corporations, associations, and trusts, with a view to determining the effect of such ownership and control on interstate and foreign commerce, and, to the extent necessary to determine the effect of such ownership and control, to make like investigation of common carriers so engaged."

CONCLUSION

Thus, we have seen that the holding company occupies in many instances a position similar to that of an individual holder. Its relation to the minority holder when it controls a majority of the stock of a corporation, is generally the same as that of any other majority holder.

It will maintain its separate entity even though it manages a number of other corporations, provided it does not fall within the abstract governing rule laid down by the courts, the so-called "adjunct" or "alter ego" theory, and is not used as a cloak for the perpetration of fraud. However, each case should be regarded on its own facts.

Then we have seen that the states are not in accord in respect to their attitudes of holding companies, some sanctioning and others condemning their creation. Although these adverse opinions seem to be fixed and set, the states that favor holding companies are gaining in number.

Lastly, with the Federal Government manifesting interest in the subject, we realize that we are confronted with something that will merit any consideration we desire to give to it.

CHARLES SCOTT SYKES,
Member of the Mississippi and District of Columbia Bars.

THE SIGN STATUTE.*—In an article on the Sign Statute published in the Mississippi Law Journal in No. 2 of Volume 1, October 1928, the following sentence occurs: "With the advent of the automobile and elaborate refreshment parlors it (the Statute) will doubtless be productive of increasing litigation." Since then two cases have reached the U. S. C. C. A. (4th) construing the Virginia Trader's Act. One bankruptcy court alone has passed on a half dozen cases, involving a truck, an electric refrigerator, graphaphone, piano player, popcorn machine and show cases. Four articles in law reviews have also added to the discussion in an attempt to find a solution on principle, precedent and practicability.

The bones of contention have finally somewhat simmered down and may be thus summarized:

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* See Volume 1, p. 203.

Does the Sign Statute apply (1) To lien creditors only. (2) To Fixtures as well as to articles intended for resale. (3) When the instrument of title or lien is recorded. (4) Where the trader is doing business solely on his own account exactly as it would where he had an undisclosed principal or partner.

VIRGINIA TRADER'S ACT.

If any person transact business as a trader, with the addition of the words "factor," "agent," "and company" or "and Co." and fail to disclose the name of his principal or partner by a sign in letters easy to be read, placed conspicuously at the house wherein such business is transacted, and also by a notice published for two weeks in a newspaper, if any, printed in the city, town or county wherein the same is transacted; or if any person transacts such business in his own name, without any such addition; all property, stock, or choses in action acquired or used in such business, shall, as to creditors of any such person be liable for the debts of such person. This section shall not apply to a person transacting business under a license to him as an auctioneer or commission merchant."

The original Statute was enacted in 1839, and amended in 1849. Va. Code Ann. (Michie 1924) sec. 5224.

MISS. SIGN STATUTE

If any person shall transact business as a trader or otherwise, with the addition of the words "agent," "factor," "and company" or "and Co." or like words, and fail to disclose the name of his principal or partner by a sign in letters easy to be read, placed conspicuously at the house where such business is transacted, or if any person shall transact business in his own name, without any such addition, all of the property, stock, money and choses in action, used or acquired in such business, shall, as to the creditors of any such person, be liable for his debts, and be in all respects, treated in favor of his creditors as his property.

Sec. 1300 Campbell's Code (1880); Sec. 3334 Hem. Code (1927).

In *U. S. Motor Truck Co. vs. Securities Co.*, 131 Miss. 665; 95 So. 639, a Truck Company sued out a writ of Replevin and the Securities Company filed its claim, stating that the Truck Co. sold the truck to the Daniel Auto Co., a trader, for the purpose of resale, which Company placed same in its sales room at Meridian and later sold it to a party named Broach, retaining title thereto. The Auto Company then sold the notes and bill of sale to the Securities Company, a purchaser without notice. Upon default in the payment the Securities Company sued Broach, took judgment, and the truck was sold to the Securities Company by the Sheriff under execution to satisfy the indebtedness. The original conditional sales agreement had a provision in it that the vehicle should be located at Gulfport and not sold, let, assigned, etc., without the written consent of the seller. The court held that there was no proof to sustain the contention that the property was sold for the purpose of resale; that the clause in the contract expressly stipulates against that, positively negativing any authority so to do; concluding with the statement that "there is no allegation nor proof that the Sign Statute was violated as in the case of *Columbus Buggy Co. vs. Turley* (73 Miss. 529)." The Securities Company introduced a witness who worked for the Auto Company who testified that the truck in question was the only 3½ ton truck of that brand handled by the Auto Company; that other trucks of the Truck Company were sold by the Auto Company; and that all trucks so sold were brought from Gulfport to Meridian to that place of business.

It will be observed that in this case no creditors (nor a trustee in bankruptcy representing creditors) were involved,—the original vendor reclaiming

the truck from one who bought it from, and standing in the shoes of, the dealer who was held not to have the right to re-sell. To permit an automobile manufacturer to sell cars to an automobile dealer, engaged in no business other than the sale of automobiles, to claim that the right and power of re-sale by the dealer depends on some unrecorded agreement between them, is striking a mightily blow at the efficacy of the Sign Statute.

Another interesting case is that of the *Southern Dairies Inc. vs. Cooper*, 35 Fed. (2nd) 439 (C. C. A. 4th, 1929). The Horn Ice Cream Co. had leased a refrigerator to the bankrupt under a straight lease for a term of years. The bankrupt transacted business as a confectioner in his own name and for his own account. The refrigerator was used for storing and handling the ice cream which he sold. The Horn Company assigned its title to the Southern Dairies. Bankruptcy ensued and the trustee took possession. The District Court denied the petition of the Southern Dairies to reclaim but the Circuit Court of Appeals held it was entitled to the refrigerator. It was held that if the trader was doing business in own name, and had no principal or partner (in the sense of a general principal or partner) to disclose the statute had no application. But if the trader holds merchandise for the purpose of resale, with express or implied power to dispose of same, it does apply.

The Mississippi courts have not attempted to differentiate between "lien creditors" and "creditors" regarding the Sign Statute. The trustee in bankruptcy is, of course, a lien creditor of high order from the time of the filing of the petition. Before the time when he becomes such a "lien creditor" the creditors or claimants might perfect their lien by some legal proceeding, whether under the purchase money lien statute or levying execution under judgment, as a landlord and materialman might do or perhaps by recession because of fraud, unless the Bankrupt Act rendered them null and void as being within the four months period. The vendor has the right to take his own—repossess the thing—from the vendee when title has been reserved unless some paramount claim was present and established at the time of taking—so says the United States Supreme Court construing the Virginia Trader's Act, on the ground that "lien creditors" only are meant.

The statute is very plain is designating "all property—used or acquired in such business—and be in all respects treated in favor of his creditors as his property." It is hard to conceive why a $5,000.00 soda fountain should not be considered such property, while the few dollars of perishable material used in mixing the drinks should be so classed. They are both necessary and indispensable ingredients of the soft drink business, unless on the theory that a soft drink stand, like a restaurant, or insurance agency, is not a "trader" within the purview of the statute.

As to the necessity of recording: There is nothing in the statute, and only by inference in the decisions, that would show that recordation would take the matter out of the statute. The trend in Mississippi might be that by recording the instrument this would be constructive notice, and that the purpose of the statute to cut off secret liens and prevent fraudulent conveyances would be accomplished thereby. In Virginia it has been held that recordation has no effect.

The stock situations involving the Sign Statute may be summed up as follows:

1. John Doe conducts the Doe Drug Store for an undisclosed principal named James Smith. Doe buys merchandise for the drug trade and in addition installs a soda fountain with the vendor retaining a lien thereon, a cash register under a conditional sales contract, a typewriter, adding machine and show cases.

2. John Doe operates and owns a drug store which is conducted under the name of James Smith Drug Store just as above.

Can the creditors of Doe take the property (a) the general stock as against Smith (b) the other things as against claimants under their various liens?

Can the creditors of Smith take the property (a) the general stock as against Doe, (b) the other things as against claimants under their various liens?

The question has been raised, does the statute apply in cases where the trader does business in his own name; and if so, is it limited? An answer has been made that its application is limited to property of others used in the business in the sense of possession with power of sale. This is another way of stating some kind of agency, and sale ability must be implied. It has been said that no sign is necessary in cases where the owner (the one who actually conducts the business) does business in his own name; it is only necessary when he does business otherwise. Consequently, a special sign in such a case would be unnecessary and foolish. And if he has an undisclosed principal and does business in his own name, nothing but a compliance with the statute will save the property involved.

From the foregoing it may be deduced that where a trader transacts business for an undisclosed general principal, all of the property used and acquired in the said business which he got from the undisclosed principal, regardless of kind or character, is liable for the indebtedness. It is up to the principal to protect himself. A dealer, selling an article not intended for resale, to the trader who has an undisclosed partner, may be protected on the ground that there is no implied power of resale; and also because as far as the dealer is concerned he can only be considered an undisclosed party himself in a limited and specific sense, as distinguished from a general undisclosed principal. Where a person does business in his own account, all the property the subject of resale in the nature of the business involved or where not ordinarily the subject of resale if an express or implied agency may be inferred, is liable for the debts.

WILLIAM A. SCHMITT,
Member of the Clarksville, Mississippi, Bar.

RECENT IMPORTANT DECISIONS

CARRIERS—DEGREE OF ATTENTION REQUIRED OF A BUS COMPANY TO PASSENGER INJURED WHILE TRAVELING IN COMPANY'S VEHICLE.—On September 17, 1928, appellee, the Gregory Bus Lines, Inc., was operating a bus line as a common carrier of passengers, and on that date appellant took passage on one of appellee's carriages at O'Reilly in Coahoma County en route to Memphis, having purchased a ticket to that destination. While en route to Memphis, a stone thrown from the road by a passing automobile, struck the bus window next to which the appellant was riding, shattering glass, a sliver of which struck appellant in the left eye, cutting both the eyelid and eyeball badly. The passengers noticing the serious condition of the appellant's eye, called the driver's attention to same. The driver stopped at a small town and procured temporary relief such as a general practitioner could give, there being no specialist available. The doctor advised immediate attention upon arrival at Memphis. However, when the bus arrived at Memphis, the men in charge of the station did nothing for the appellant other than make a pallate of two bus cushions for the appellant to rest upon, although the appellant repeatedly requested that he be given attention, not being able to secure same for himself, due to pain, distress, and blindness caused by the accident The next morning the appellant was assisted on a bus en route to St. Louis. When appellate arrived in St. Louis, he received attention, which his son procured for him, but it was too late to save his eye. Held, on appeal, that carrier neglecting to provide medical attention to injured passenger after arrival at destination is liable for resulting damage. *Hughes vs. Gregory Bus Lines, Inc.*, (Miss.) 128 So. 96.

In deciding this case, the court has done so with ample authority, both from our own state court and other state courts: *Railroad Co. vs. Byrd*, 89 Miss. 321; *Chicago, B. & Q. R. Co. vs. Schrimpf*, 236 F. 200; *Southern Ry. Co. vs. Hayne*, 95 So. 879; *Clayton vs. Philadelphia, B. & W. R. Co.*, 106 A. 577; *Connolly vs. Railway Co.*, 41 La. Ann. 57. Hence we have no new principles of law announced in this case. However, since busses are becoming so numerous and, too, since they represent an entirely new phase of transportation, it is interesting to note just what attitude the courts of the country are taking with reference to them. It is gratifying to see, not only from this case, but many others, that the courts are applying the same rules to the busses that they are applying to the railroads, which in effect means that if busses are to traverse the country, competing with our other carriers, that they must offer the same protection to the public as the railroads and other carriers.

CARY STOVALL.

RAILROADS—MAINTENANCE OF PRIVATE FACILITIES ESSENTIAL TO OPERATION OF RAILROADS MAY BE GROUNDS FOR ACTION FOR DAMAGES FOR NUISANCE.—In 1924 appellant became the owner of some property not abutting the right of

way of the appellee's railroad tracks, but separated therefrom by the width of a street. In 1910 the Railroad Company had secured the 100 ft. right of way by a deed which provided that the railroad, its successors and assigns, should be released from all damages to abutting property from the construction and operation of the railway over the land conveyed and over the streets of the city. Subsequent to the acquisition by the complainant of the property mentioned above, said complainant built thereon a fine house. Shortly after the completion of the home, the appellee proceeded to install private switch tracks, yards, railway workshops, terminals, places for refueling, firing, and watering, and places for switching, storing, and keeping engines, and coaches, just across the street from appellant's property. Pleadings allege that the plaintiff and his family were constantly annoyed by noises, soot, smoke, and cinders, and trash and filth from parking of camp cars, and the placing, for long periods of time, cars containing animals, fertilizer, and other filth; that plaintiff's house was damaged by the vibrations caused by the operation of the locomotives and cars, and rendered same unfit for residential property.

The railroad bases its defense mainly on the fact that the facilities established adjunct to the terminals are essential to the proper conduct of the business, that such were installed by special authorization of the Interstate Commerce Commission, that complainant is not an abutting property owner, and that the release incorporated in the above mentioned right of way deed exempted the railroad from liability for damages in the present suit for nuisance.

The Mississippi Supreme Court held:

(1) That the fact that private railroad facilities were essentially adjunct to the terminals of the appellee, location of which was authorized by the Interstate Commerce Commission, was not a defense to the action for damages for nuisance. (2) That the right of way deed which contained a release from damages to abutting property was no defense to an action by a nearby lot owner for nuisance. (3) That the railroad is not liable for consequential damages resulting from the normal operation of trains, but that the maintenance of the private switch tracks, workshops, etc., and causing noises, soot, vibrations, etc., made a case of private nuisance, and recovery for same was not confined to abutting property. *Robertson vs. New Orleans & G. N. R. Co.*, 129 So. 100.

The questions involved have been the subject of repeated adjudication in the courts both state and federal. The present decision is supported, in the main, by *King vs. Railway & Light Co.*, 88 Miss. 456; *Dean vs. So. Ey. Co.*, 112 Miss. 334, and *Louisville & N. R. R. Co. vs. Lellyett*, 114 Tenn. 368, which case is relied upon both in the King case and the Dean case, *supra.* As in the Dean case, the court draws a distinction between that part of the functions of a railroad which are public and those which are private. So the court says, "a railroad serves both the public and itself." As to private property a railway company stands in questions of private nuisances substantially in the same status of other concerns, or individuals, who maintain nuisances.

As to the confining of recovery to those property owners who possess abutting property, the court expresses the opinion "that there is no warrant for any arbitrary line confining recovery strictly to abutting property."

Especially also is it emphasized that the Interstate Commerce Commission is primarily an inquisitorial and administrative body, possessing no large measure of real judicial authority. In the words of the court, "it assumes no final jurisdiction to award damages for the taking of

private real property for public use; it has no conclusive jurisdiction of that particular subject-matter nor any adequate machinery, suitable to the adjudication, under due process, of that question.''

Nor is the release considered of any avail since such a conveyance confers no rights or immunities that would not have equally existed under the statutory proceedings in eminent domain. 2 Lewis, Eminent Domain, p. 474 et seq. Such covers the normal public operations of the railway only.

The decision is a strong one founded on rational and definite bases. But the court advances some dubiousness as to the soundness of the decision, asserting the following: ''It would seem that, to be on safe ground, the railroad would have to condemn all non-abutting lands that would be so damaged, regardless of their distance from the lands actually taken.'' It is further stated, ''the record in the present case fails to show that the appellee had the power of selection of the place for its works, but does show that the Interstate Commerce Commission, acting under authority from the Commerce Clause of the Federal Constitution and the Transportation Act, granted appellee a certificate of necessity and convenience authorizing the location of such works exactly where they are. Whether the appellee initiated the proceeding before the Interstate Commerce Commission is not shown, nor does the record in this case show either, if the works had been located elsewhere, such location would have met the requirements of the appellee as well as of the public.''

D. COTTRELL, JR.

Corporations—Foreign Corporations, as Regards Venue in Transitory Action, in Same Position as Domestic Corporation.—The appellee was a foreign corporation, doing business in this state, and under section 11 c. 90 Laws 1928, it designated a resident agent within this state upon whom process might be served. The evidence disclosed the agent of appellee as a resident of H county. The appellant sued appellee in the circuit court of F county upon a transitory cause of action which accrued in that county, and service was had on the resident agent in H county, there being no service of process in F county where the suit was brought.

The sole question before the Supreme Court was whether the circuit court of F county had jurisdiction to proceed with the suit under these facts as above stated. The court speaking through Justice Griffith, answered the question in the affirmative in *Sanford vs. Dixie Construction Company* (Miss.), 128 Southern 887.

Section 500 Hemingway's 1927 Code specifically states that, ''Civil actions of which the circuit court has original jurisdiction shall be commenced in the county in which the defendant or any of them may be found, and if the defendant is a domestic corporation, in the county in which said corporation is domiciled, or in the county where the cause of action may occur or accrue, except where otherwise provided. . . .''

Prior to the enactment of the above cited code section, the place of suit against and service on a private foreign corporation in transitory actions was controlled by Section 4507 Hemingway's 1927 Code which provides that:

"Process may be served upon agent of said corporation found within the county where the suit is brought . . . in order that defendant corporation may also have effectual notice, it shall be the duty of the clerk to immediately mail a copy of the process to the home office of the corporation. . . ." Our court has held uniformly that an action against the defendant corporation could be maintained only in a county where an agent of the corporation was found and served with process. The same rule now exists and applies where no resident agent is shown to have been designated in accord with the Laws of 1928, supra. But "the question here seems to be, what is the effect of Section 11 C. 90 Laws 1928," when the foreign corporation has fully complied with, and has appointed a resident agent in one of the counties upon whom process may be served and the acceptance of the agency duly filed with the secretary of state as provided?

Several of the courts of last resort have construed statutes similar to the one at bar in material particulars to mean that, "the appointment of such an attorney in fact is made for the whole state," and the venue is not controlled by the residence of the agent designated. A difference of opinion has been raised seemingly to this view in *American Surety Company vs. Holly Springs* (Miss.), 27 Southern 612. Here a summons was issued in Marshall county for the defendant and it was returned "Not found." A duplicate summons was issued to Hinds county and there served upon the secretary of state. HELD: That the court of Hinds county had no jurisdiction. But when this case was decided in 1900 there was no provision in the venue statute that a corporation, whether domestic or foreign, could be sued in the county where the cause of action accrued. Section 650, Code 1892, then in force, provided only that civil actions shall be commenced "in the county in which the defendants or any of them may be found."

The United States Supreme Court threw a searching light on the subject in *Power Manufacturing Company vs. Saunders*, 274 U. S. 490; 71 L. Ed. 1165—a similar case only in part. (Quoting the syllabus) "A foreign corporation is unconstitutionally deprived of the equal protection of the laws by statutes permitting it to be sued in any county in the state when it has established its right to do business, or is present, or has a representative in the county of suit or not, while suits against domestic corporations and individuals can be brought only in counties where they are found or do business, or have a represenative." The defendant, a corporation, objected to being sued in a county where it does no business and has no office, officer, or agent on the ground that they are discriminated against as against their constitutional right provided in Amendment 14 of the Federal Constitution. In this opinion Justice Holmes dissented and Justice Brandeis concurred. We may conclude that in the opinions and briefs certain fundamental ideas recur, at least in the language used, carrying certain implications which confuse and that there has been consequent confusion of thought at the Bar. The difference between the Arkansas statute, from which the above quoted part of the opinion flowed, and the statute at bar, being; the Mississippi statute, as now construed, includes both resident and non-resident corporations in a state wide venue, whereas the Arkansas statute provides a state wide venue only for the non-resident or foreign corporation. (See caption.) Certainly there is in the latter instance a discrimination not theoretical merely, but real and substantial, not to be favored and which is unconstitutional. Corporations, foreign or domestic, like

individuals are not to be discriminated against in the eyes of the law, and their constitutional rights.

Justice Griffith states, "We must hold therefore that, by the new statute of 1928, it was the intention, and it has the effect, when a foreign private corporation has complied with it, to place the said foreign private corporation in regard to venue in transitory actions in exactly the same attitude as a domestic corporation and that its effect is to domesticate the said foreign private corporation for the purpose of suit and process—although for that purpose only. That such a construction is just is obvious, and that it squares with every constitutional principle and requirement is likewise obvious, and being obvious needs no further elaboration."

WARNER BEARD, JR.

MASTER AND SERVANT—DUTY TO FURNISH NEWEST, BEST AND SAFEST MACHINERY, APPLIANCES, AND PLACES TO WORK MET WHEN MASTER FURNISHES THOSE SUCH AS ARE REASONABLY SAFE AND SUITABLE FOR THE PURPOSE EVEN THOUGH SOME OTHER WAY MIGHT BE SAFER AND BETTER.—One M. R. Bowles sued the Vehicle Woodstock Company for the loss of his left eye while he was temporarily serving as a sawyer for the defendant, charging that the defendant was negligent in failing to have a wire screen between the saw and the sawyer, which negligence resulted in a fragment of bark being thrown from the saw, striking the sawyer in his left eye and causing the subsequent loss thereof. The verdict of the jury was for $7,500 from which the Vehicle Woodstock Company appeals. HELD: On appeal, that master was not negligent in failing to have screen to protect sawyer, and that sawyer assumed risk of usual and ordinary danger and hazard attending and incident to, operation of sawmill. Judgment reversed. *Vehicle Woodstock Co. vs. Bowles*, Supreme Court of Mississippi, May 14, 1930. 128 So. 98.

The master is not liable after furnishing reasonably safe and suitable machinery, appliances, and places for work. 39. C. J. 429. This general rule does away with the idea that the master must furnish the newest, best, and safest machinery, appliances, and places for work. Where the equipment is standard, and such as in general use by business of the same kind, under similar conditions, there is no negligence, even though some other way or some other appliance might be a safer and better way or appliance. (*Kent vs. Yazoo & M. V. R. Co.*, 77 Miss. 499, 27 So. 620.) All that appears to be necessary is that the machinery, appliances, and ways are in conformity with common and ordinary usages in sawmills of like kind and capacity similarly situated. 39 C. J. 332.

The court remarks in the case of *Wonder vs. Baltimore & Ohio R. R. Co.*, 32 Md. 411, 3 Am. Rep. 143: "A master is not bound to change his machinery in order to apply every new invention or supposed improvements in appliances, and he may even have in use a machine or an appliance for its operation shown to be less safe than another in general use, without being liable to his servants for the consequences of the uses of it." The case of *T. W. & W. Ry. Co. vs. Asbury*, 84 Ill. 434, adds further that, "A master is not required to seek and apply every new invention, but must adopt such as are found, by experience, to combine the greatest safety with practical use."

Some danger inheres in almost every employment, and the law does not impose the impossible task of furnishing absolute safe instrumentalities. (*Blick vs. Olds Motor Works*, 175 Mich. 640, 141 N. W. 680, 49 L. R. A. (N. S.) 883 and note.) The measure of the employers duty is the exercise of ordinary or reasonable care to provide safe tools, machinery, and appliances. (*Bertha Zinc Co. vs. Martin*, 93 Va. 791, 22 S. E. 869, 70 A. L. R. 999). He need not provide instrumentalities of any particular kind or character as a rule; nor need he procure the very latest, best, and safest devices in order to relieve himself of responsibility for injuries to employees. (*Bajus vs. Syracuse, etc. R. Co.*, 103 N. Y. 312, 8 N. E. 529, 57 Am. Rep. 723). His instrumentalities must be "reasonably" safe, by which is meant safe according to the usage and custom of prudent employers generally. (*Sroufe vs. Moran Bros. Co.*, 28 Wash. 381, 68 Pac. 896, 58 L. R. A. 313). (*Titus vs. Bradford, etc. Co.*, 136 Pa. St. 618, 20 Atl. 517.) The degree of care depends upon the danger to which the employee is subjected. (*Coin vs. John M. Eagle Lounge Co.*, 222 Mo. 488, 121 S. W. I, 17 Ann. Cas. 888, 25 L. R. A. (N. S.) 1179.).

CARROLL KEMP.

SEARCH AND SEIZURE—INTOXICATING LIQUORS—RIGHT OF OFFICER TO SEIZE LIQUOR WHICH HE RECOGNIZES FROM THE PUBLIC ROAD AS BEING WHISKEY.—An officer of the state and another were in the public road in front of the appellant's residence, intending to make a search thereof under a warrant which was defective for the want of serving it within a reasonable time after it was issued. While the officer was there, an automobile drove up and stopped in front of the appellant's house. The occupants of this car got out and went into the house and returned with the appellant, the latter going a short distance therefrom into some bushes and returned with a glass jug which the officer said he recognized as containing whiskey. The officer went to the appellant and seized the jug, the contents of which proved to be whiskey. He arrested the appellant and served the warrant. The appellant was convicted in the lower court for violating the Prohibition Act. Thereupon he made this appeal on the ground that the evidence of the officer was obtained illegally, since the warrant was defective. HELD: That the offense was committed in the presence of the officer, hence the warrant was not necessary. Judgment affirmed. *Dotson vs. State*, 126 So. 38 (Miss. 1930).

To render an arrest for a misdemeanor lawful, without a search warrant, the offense must have been committed in the presence of the officer, *Allen vs. State*, 183 Wis. 323, 197 N. W. 808 (1924); *Snyder vs. U. S.*, 285 Fed. 1 (1922); *U. S. vs. Setaro*, 27 Fed. (2nd Ser.) 134.

A mere suspicion that the offense had been committed is not enough to justify an arrest or search without a warrant, *King vs. State*, 118 So. 413 (1928); *Catchings vs. Commonwealth*, 204 Ky. 439, 264 S. W. 1067 (1924).

This is true even though the violation is a felony, *Eiler vs. State*, 196 Ind. 562, 149 N. E. 62 (1925); *People vs. Steward*, 232 Mich. 670, 206 N. W. 337 (1925).

The eye can commit no trespass, and no unlawful search is made by an officer who while in a place where he has the right to be, observes things occurring in open view on private property. *Dotson vs. State, supra.*

It is submitted that the instant case is sound on both principle and authority. The offense was a misdemeanor and the officer had more than a mere suspicion of the defendant's guilt; the offense was committed in his presence.

JOE O. WALTON.

District and Prosecuting Attorneys—Right to Sue in Behalf of the State.—The state, on relation of F. D. Hewett, District Attorney of the 14th judicial district of this state, filed its bill against the appellants, The Capitol Stages, Inc., and the Pickwick Greyhound Lines, Inc., charging that they were wrongfully and illegally using state highway Number 51, which runs through the counties of Pike, Lincoln and Copiah, in said district, to such an extent as to constitute a public nuisance. The bill prayed for an injunction restraining the appellants from so using the highway, and for a decree against appellants for $10,000 damages already done the public for such use. The facts in the case show that the highway not only ran through these counties in this district but it also ran through a large number of counties in other districts. It was in fact, a state highway, maintained by the State Highway Commission out of state and federal aid funds. Appellants demurred to the bill, which demurrer was by the court overruled, and an appeal to the Supreme Court was granted to settle the principle of the cause. HELD: As to litigation, subject matter of which is of statewide interest, Attorney General alone has right to represent state, and an action cannot be brought in the name of the state, on relation of the District Attorney involving such matters. *Capitol Stages, Inc., et al, vs. State, ex rel. Hewitt, District Attorney,* Supreme Court of Miss. 128 So. 759.

The present case is the first of its nature to be brought before our Supreme Court, and it settles once and for all who is the proper person to institute proceedings in behalf of the state when the subject matter involved is of state wide interest. This rule prevents great confusion and detriment to the public welfare, which would almost certainly arise if the District Attorneys in the several districts were allowed to institute conflicting litigation against concerns wherein the subject matter involved is of statewide, rather than local interest. On the other hand, this confusion is not likely to arise with the right to institute such suits vested in the Attorney General alone, as he would have in view not purely local interests, but the paramount statewide public interests.

The Supreme Court of Mississippi thinks a fair and reasonable interpretation of the language and purpose of the statutes prescribing the authority and duties of the District Attorney is: (1) They have no authority to represent the state in any litigation outside the counties of their districts; and (2) They have no authority to represent the state in any litigation in their districts where the subject matter of such litigation is of statewide interest, as distinguished from local interest, except as provided by the last clause of Section 1661, Code 1906. Section 1465 Hemingway's Code 1927.

BUFORD ROWLAND.

BOOK REVIEW

MAY IT PLEASE THE COURT—By James M. Beck, Atlanta: The Harrison Company, 1930, pp. XVII, 511.

This is the title of a book that has recently been published, comprising a series of arguments and addresses delivered in this country and in England by Hon. James M. Beck, formerly Solicitor-General of the United States and now a member of Congress and whose home is in Philadelphia, Pennsylvania.

Mr. Beck is justly regarded as one of the greatest lawyers in this country, whose success as a lawyer has been surpassed, so far as the records show, by no other lawyer in the United States. This book will appeal, I am sure, with great force to every lawyer, and particularly to young lawyers, because these arguments and addresses are classics and show beyond any question or doubt that Mr. Beck is one of the most learned men that this country has ever produced.

The first office held by Mr. Beck after his admission to the bar in 1884 was the office of Assistant District Attorney in 1888-1892. He was afterwards appointed United States District Attorney for Pennsylvania in 1896, and thereafter, in 1900, appointed Assistant Attorney-General of the United States and in 1921 appointed to the highest and most responsible position in the Legal Department of the United States, to-wit, Solicitor-General. It is not generally known, but this office is really a more responsible position and carries with it more duties than that of the Attorney-General; in other words, the Solicitor-General is the man upon whose shoulders devolve the duties and responsibilities of the office of Attorney-General, and he is the one who is expected to, and does, appear before the Supreme Court of the United States in all cases in which the Government is interested. While the Attorney-General enjoys the honors of the position, as a matter of fact the labors and duties of his office really fall upon the Solicitor-General. As to how well Mr. Beck has performed these duties is a matter of common knowledge. His record is unsurpassed by that of any former Solicitor-General.

While Solicitor-General for four years, Mr. Beck had charge of over eight hundred cases in the Supreme Court of the United States. Not all of these cases were for oral argument, but at least two hundred were argued orally, and many of them involved large amounts and were of the greatest importance to the Government. Of these, we are told, Mr. Beck personally argued at least one hundred.

One of the greatest services Mr. Beck ever rendered was the exhaustive treatise he wrote and afterwards published in book form called "The Evidence in the Case," in which he proved that the responsibility for the late World War rested upon Germany or rather the late Kaiser. This book enjoys a world-wide reputation and has been universally commended.

After the close of the late war, Mr. Beck was paid a compliment never before paid to any other lawyer by being called to the bar of England, with-

out the obligation of being "screened" or observing the time-honored formality of eating a certain number of dinners in one of the Inns of Court in London. Prior to that time he had been made a Master of the Bench of Gray's Inn, one of the historic Inns of Court. He afterwards delivered five lectures on the American Constitution under the auspices of the University of London at Gray's Inn.

He afterwards visited Paris and was given a series of receptions, in which the Minister of Justice, the University of Paris, and the Chancellery of the Legion of Honor and other civic institutions participated, and was paid the honor—said to be unprecedented—of being formally received by the Cour de Cassation, the highest court of France. After his reception, he delivered in the court room a lecture on the Supreme Court of the United States to the Bench and Bar of France.

He has published a scholarly work entitled "The Constitution of the United States," a masterpiece. President Coolidge wrote the introduction to the American edition, the Earl of Balfour, that to the Oxford University Press edition, the Dean of the Faculty of Law of the University of Paris, that to the French edition, and the Chief Justice of Germany, that to the German edition.

One of the earliest cases argued by Mr. Beck before the Supreme Court of the United States was in 1896, when he argued the case of Durland vs. United States, 161 U. S. 308. Since that time he has appeared in a great many important cases involving questions of constitutional law of more than ordinary importance.

One of the most famous cases in which Mr. Beck was interested before the Supreme Court of the United States was the Danbury Hatters Case, 208 U. S. 274, where he succeeded in getting the Supreme Court of the United States to apply the Sherman Anti-Trust Law to a nation-wide labor boycott of a manufacturer's products.

Possibly one of the greatest cases argued by him before the Supreme Court of the United States was the Lottery Case, 188 U. S. 321, which carried out the doctrine of Gibbons vs. Ogden by holding that the constitutional power to regulate commerce included the power to prohibit commerce for federal purposes. This has been justly regarded as one of the greatest arguments made by him before the Supreme Court of the United States.

Another great victory which he achieved before the Supreme Court of the United States, and which is particularly interesting, is the decision of the Supreme Court of the United States in the case of Myers vs. United States, 272 U. S. 52, which sustains the contention of President Andrew Johnson when he discharged Secretary of War Stanton. Mr. Myers had been appointed by President Wilson on July 21, 1917 Postmaster of the first class at Portland, Oregon, for a term of four years, by and with the advice and consent of the Senate. On January 20, 1920, Myers' resignation was demanded, when he refused to resign, and thereafter, on February 2, 1920, President Wilson had him removed from office. He protested on the ground that the Senate had not consented to his removal. Afterwards, he brought suit, to-wit, April 21, 1921, in the Court of Claims for his salary from the date of his removal on the ground that he had been illegally removed, which claim was denied by the

Court of Claims, when an appeal was prosecuted to the Supreme Court of the United States.

Chief Justice Taft, speaking for the Supreme Court of the United States, said that, under an Act of Congress of July 12, 1876, Myers was appointed postmaster "with the advice and consent of the Senate" as a first class postmaster. The act under which he was appointed provided that "Postmasters of the first, second and third classes shall be appointed and may be removed by the President by and with the advice and consent of the Senate, etc." The Supreme Court held: "The power of appointment to office carries with it the power of removal" and that "the executive power vested by the Constitution in the President of the United States extends to the removal, without the consent of the Senate, of executory officers appointed by him with such consent."

The Court also held in this decision that the Tenure of Office Act of 1867—the act which was vetoed by President Andrew Johnson and for which he was impeached and escaped conviction by only one vote—was invalid as an attempt to interfere with the constitutional powers of the President. In other words, the decision of the Supreme Court in this case vindicated and sustained the position taken by President Johnson when he undertook to remove Secretary of War Stanton, but was temporarily prevented from doing so by the Tenure of Office Act, passed by Congress to prevent his removing Stanton, and which act, as I have said, was vetoed and his veto overruled by the Congress, and thereafter the President was impeached for doing the very thing that the Supreme Court of the United States approved on October 25, 1926, as shown by its decision in the Myers Case. In other words, President Wilson did the very thing that President Johnson did, for which he was impeached, and afterwards his action was approved by the Supreme Court of the United States.

Mr. Beck's masterly oral argument before the Supreme Court at the hearing in this case is reported in full in this volume, to which I call especial attention.

One of the greatest speeches, I think, that he has ever made, and which has attracted more attention and been the subject of more comment than any speech which he has ever delivered was that which he delivered in the House of Representatives on February 7, 1930, on the prohibition question. While we may not agree with Mr. Beck in his argument and conclusion, no fair man can read his powerful argument on that occasion and not be impressed with the fact that it is one of the strongest, most exhaustive and plausible presentations that has yet been made of the anti-prohibition side.

All of his arguments and addresses that are published in this book are interesting because they are so thoroughly considered and eloquently expressed. One of his most attractive and interesting speeches is that on "Elihu Root, the Lawyer and Statesman." This address was delivered at a dinner given on February 13, 1925 by the Union League Club of New York City to Mr. Root on the eightieth anniversary of his birthday. Chief Justice Hughes of the Supreme Court of the United States was the chief speaker, who was followed by Mr. Beck. This address is replete with originality, reminiscence, lucidity of expression and a charm of manner that I do not think I have ever seen equaled, certainly not surpassed.

I want to commend this book, not only to the lawyer but to the layman, it being one of the most delightful books published in many years and one which should be, in my humble judgment, in every library. I give it my hearty and unqualified endorsement, without any restrictions or limitations whatever, as one of the most interesting books that I have ever read and one that should be read by every young man, and particularly by the young lawyer.

A. F. GARDNER,
Member Greenwood, Mississippi, Bar.

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